DEPARTMENT OF
CRIMINAL JUSTICE TRAINING

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2014 CASE LAW UPDATES

FIRST QUARTER

Kentucky Court of Appeals, Kentucky Supreme Court, U.S. Sixth Circuit Court of Appeals.

LEADERSHIP INSTITUTE BRANCH
LEGAL TRAINING SECTION
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NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 501- VOLUNTARY INTOXICATION

Johnson v. Com., 2014 WL 702183 (Ky. 2014)

FACTS: Johnson was in the driveway of a friend's home in Laurel County when officers arrived to serve a search warrant on the location. Deputy Back detained him briefly to check for warrants, and in fact, discovered that Johnson was the subject of a felony non-support warrant. He was secured in Back's cruiser. When Back returned, he discovered that "Johnson had escaped and the door and backseat of the vehicle were damaged." Johnson was found later and arrested with charges of Criminal Mischief 1st, Escape 2nd and PFO. The repairs cost about $1,200 and took about three hours.

Johnson argued that he escaped due to "paranoia caused by his methamphetamine use, that the backseat was already damaged and that a mere tap on the window screen caused it to fall out, allowing his escape." Johnson was convicted and appealed.

ISSUE: Does mere ingestion of a drug require that the jury be instructed about voluntary intoxication as a defense?

HOLDING: No

DISCUSSION: Johnson argued that the jury should have been instructed on the defense of voluntary intoxication, which may have allowed the jury to find that his "methamphetamine intoxication negated the requisite mental state to convict." The Court noted that under KRS 501.080(1) the defense can be raised if it "negatives the existence of an element of the offense." The Court disagreed that the evidence was not enough to raise the defense, and held that "his reasoned recollection of the events surrounding his arrest and escape supports a finding that he knowingly and intentionally selected the means of quelling his fear by escaping from custody." The deputy testified that Johnson "did not appear to be agitated or under the influence of any substance at the time of his arrest." Johnson also argued that because no receipt was presented detailing the cost of the repairs, he was entitled to a verdict in his favor on the Criminal Mischief charge. The only evidence concerning the damage was given by the deputy, who listed the specific damage done to the car, and that it was in good condition prior to the incident. The Court agreed that was sufficient to prove the damage.

Johnson's convictions were affirmed.

PENAL CODE – KRS 503 – USE OF FORCE

Com. v. Farmer, 423 S.W.3d 690 (Ky. 2014)

FACTS: On April 27, 2012, Farmer shot and killed Popplewell, who had entered Farmer's Russell County property "wielding two large tobacco sticks." He was indicted for Murder; he raised a self-defense argument under KRS 503.085(1). The trial court, following discovery, ruled "there was probable cause to believe that the use of force against Popplewell was unlawful, and thus

Farmer was not entitled to immunity from prosecution based on self-defense." Farmer appealed the denial to the Kentucky Court of Appeals, which permitted the interlocutory appeal to proceed, analogizing it "to the civil context where this Court has recognized the right of a party to immediately appeal an order denying a motion to dismiss based on government immunity." Refusing to allow it, it reasoned, would deny "a criminal defendant the right to immediately appeal a denial of immunity would undermine the intent of KRS 503.085."

The Commonwealth appealed.

ISSUE: Is there an interlocutory appeal for a decision that someone does not have immunity under KRS 503?

HOLDING: No

DISCUSSION: The Court reviewed the issue with respect to jurisdiction of the courts under KRS 22A. Under that chapter, the Court of Appeals' "jurisdiction over the interlocutory orders of a circuit court" was limited to those laid out by statute and court rules. In KRS 503.085, no guidance was provided "as to when and how the courts would determine the immunity issue." Because the purpose of immunity requires that it be resolved at the earliest possible point in litigation, once it is raised, it must be handled expeditiously by the courts. However, the defendant must raise the defense either at the preliminary hearing of after indictment, but not at both. Once a court finds probable cause, it should not be revisited. The statute "neither expressly nor impliedly provides for" an appeal. The Court agreed that the statute provided for only a "very limited interlocutory appeal right" under Kentucky law, and as such, the decision of the Court of Appeals was reversed.

PENAL CODE – KRS 506 – CRIMINAL SYNDICATE

Jones v. Com., 423 S.W.3d 690 (Ky. App. 2014)

FACTS: On September 15, 2011, Det. Duane (Lexington PD) was contacted by a Sprint employee about several men who had purchased Blackberry phones. He suspected that the men were homeless and had executed contracts to receive discounted phones, but had no intention of fulfilling the contracts – instead selling the phones. Det. Duane followed the men to another cell phone store, but missed them there, and finally caught up with them at a third cell phone store.

He watched Liford purchase two Blackberries and sign contracts. He pulled the man aside and he "was forthcoming with information." He admitted he lived at a homeless shelter and had been approached by two people who offered him a chance to make money by purchasing the phones. All four men were residents at the shelter or volunteers there. They rode with the couple to various stores and were provided with money to make the deals. They received $20 for each phone.

Det. Duane followed him back to the van; Jones was identified as the driver and Anderson the female passenger. Jones consented to a search and several phones and receipts were found. Upon being interviewed, he admitted that he would be selling them to someone in Michigan. (The phones could be used internationally and there was apparently a ready market for them.)

Jones was charged with engaging in a criminal syndicate. At trial, Sprint employees testified that they "personally lost income when customers failed to pay for their service contracts." A manager also testified that the company would take a significant loss if the contracts are not fulfilled.

Jones, not believing what he'd done was a crime, represented himself and presented no defense. He was convicted and appealed.

ISSUE: Does proving a criminal syndicate require evidence of collaboration on a continuing basis?

HOLDING: Yes

DISCUSSION: First, Jones argued that the statute (KRS 506.120) is unconstitutional. However, because he failed to notify the Attorney General of the challenge to the statute, the Court was prohibited from addressing that issue.

The Court reviewed the statute and noted that the Commonwealth's position was that he had participated in a criminal syndicate with the underlying crime being theft by deception. The Court looked to Parker v. Com.[1] and noted that to prove the charge, the prosecution must prove more than just collaboration among the participants, but must also "prove that the activity was sustained *on a continuing basis*." Even though they had sufficient people (more than five), their activities had occurred on only one particular day and in addition, once they learned what they were doing was criminal, they intended to never do it again.

The Court agreed that the "cell-phone purchasing scheme is a new twist" with no legal precedent. Although little criminal law addressed it, throughout the country, the Court noted many civil actions had been undertaken. However, in this case, all of the phones were purchased and paid for, but the "service contracts alone were compromised." The Court opined that Theft of Phone Services and Devices (KRS 514.065) might be more appropriate, although it had never been used.

The Court suggested that "perhaps law enforcement will utilize KRS 514.065 with respect to schemes for obtaining cell phones – unless and until more specific legislation is passed to address the activity at issue in this case." Notwithstanding, the Court agreed that the elements of criminal syndication were not met in this case.

The Court reversed Jones's conviction.

PENAL CODE – KRS 511 - BURGLARY

Hall v. Com., 2014 WL 505581 (Ky. App. 2014)

FACTS: On July 29, 2010, Officer Barton (Middlesboro Police Department) was dispatched to a possible burglary. He went looking for a truck identified as being possibly involved by a witness, who had gotten a good look at the driver. He spotted a vehicle, and later testified he was certain Hall was driving. The officer lost it briefly, and when he found it, it was warm and the keys still inside, but it was unoccupied. The truck was registered to John Hall (in Manchester) but a

[1] 291 S.W.3d 647 (Ky. 2009)

checkbook with the name Curtis Hall was found. (John was determined to be Curtis's father and they lived at the same address.)

Hall was arrested and convicted. He appealed.

ISSUE: Is evidence that the suspect was inside a building enough for Burglary 3d?

HOLDING: Yes

DISCUSSION: Hall argued that the Court failed to prove he'd been inside the building, an auto parts store – an essential element in the Burglary charge. The Court noted that the inference that Hall, who was seen fleeing the scene, was inside – supported by evidence that "the locks were cut and items in the store were moved around and placed by the door." The Court ruled that Burglary 3d was appropriate.

Hall argued that he should have been allowed to impeach Officer Barton "with his written notes from the grand jury proceedings" and a photo of Hall he'd taken to the witness. At trial, both testified that Hall was driving, but Barton stated he did not remember taking a photo to the interview with the witness. However, both his report and his grand jury testimony indicated that he had done so. Ultimately, the Court ruled that the error, if any, was harmless.

The Court upheld Hall's conviction.

Bates v. Com., 2014 WL 505581 (Ky. 2014)

FACTS: Bates was accused of entering the home of Lutz and Bablitz, in Fayette County, while they were not home. Inside, he took a number of items including laptops and a gun. As he left, however, the pair, returning home, spotted him and gave chase. Bates fled but they were able to capture him and hold him for the police. He resisted arrest, was tased, and was finally subdued.

Bates told police during an interview that he knew the pair and had bought drugs from them, and that his only intention in going to their apartment was to speak to them about his displeasure over a drug buy. Because he believed they were "playing games" with him, he decided to take some items.

Bates was indicted for Burglary and related offenses. Lutz and Bablitz denied knowing him or selling drugs. He was convicted of Burglary 2nd and Resisting Arrest and appealed.

ISSUE: Is evidence of intent to commit a crime necessary for Burglary?

HOLDING: Yes

DISCUSSION: Bates argued that he was entitled to a jury instruction on criminal trespass. The court reviewed the two crimes, differentiated by the need for proof in a burglary conviction that the individual have the "intent to commit a crime." The Court agreed Bates was so entitled only if it was reasonable for a jury to believe that even if he had no intent to commit a crime when he initially entered, he formed the intent while there. Since the evidence was clear, by his own admission, that he did so form the intent to commit a theft while there, he was not entitled to that instruction.

The Court affirmed his conviction.

PENAL CODE – KRS 527 – FELON IN POSSESSON

Benton v. Com., 2014 WL 1004531 (Ky. App. 2014)

FACTS: On May 25, 2006, Allen and Johnson claimed that Benton "had attempted to rob [Allen] at his home, firing one round into the floor of the home before his gun jammed." He ejected the jammed round and fired several more rounds during a foot chase. Both testified that the gun was a "black automatic," and Allen later picked out Benton from a lineup. In a second incident that same night, Mattingly and Proctor claimed that two men (one later identified as Benton) knocked on the door of Mattingly's home, brandished firearms and demanded money. Proctor claimed Benton "struck him across the bridge of his nose with a semiautomatic handgun." He heard gunshots moments later, although Mattingly did not. (Gunshots could be heard on the 911 call made at the same time.) Proctor identified Benton in a photo lineup and both identified him at trial.

Testimony was also heard from three responding officers, none of whom could find the handgun Benton had carried. Shell casings at the scene had all been fired from the same weapon. Benton was acknowledged to be a convicted felon.

Bento was convicted for possessing the weapon. He appealed.

ISSUE: Does evidence of other crimes, in a case involving unlawful possession of a weapon, negate a conviction?

HOLDING: No (but use caution)

DISCUSSION: Because Benton was only on trial for possessing the weapon, Benton argued that the trial court should have limited any evidence of his underlying crimes. He argued that "any additional testimony" … "amounted to 'other crimes' evidence" which could have been held against him by the jury. The Court disagreed, finding that there was no evidence that the jury giving him the statutory maximum sentence was as a result of improper, prejudicial testimony.

The Court upheld Benton's conviction and sentencing.

PENAL CODE – KRS 527 - CCDW

Vega v. Com., Ky. 2014

FACTS: On January 9, 2010, Vega was stopped by Officer Perkins (Lexington PD). He had a headlight out and his license plate was not illuminated. Officer Perkins, at the driver's side window, spotted nothing out of the ordinary. Officer Bowles, however, approached on the passenger side and spotted "the barrel of a gun protruding from underneath a toolbox sitting on the front passenger's seat." He told Officer Perkins what he'd seen and Vega was asked to step out. A loaded pistol was recovered. Vega was arrested for CCDW and during a subsequent frisk, one

Lorcet (hydrocodone) pill was found in his pocket. (A half-tablet was later found in his shoe, as well.)

Vega moved for suppression and was denied. He took a conditional guilty plea to drug and weapon charges and appealed.

ISSUE: Is a weapon not located in the course of ordinary contact concealed?

HOLDING: Yes

DISCUSSION: The Court noted that this was not a case as to whether the weapon was, in fact, unlawfully concealed, but only whether the officer had probable cause to make the arrest. The Court looked to KRS 527.020(1) to interpret the term "carry" and "concealed." The Court agreed that the concept of what is concealed is very broad and that a reasonable officer could believe the weapon was concealed in this case as it was "not observable to those with whom [Vega] would have come into 'ordinary contact.'" As such, the Court agreed the arrest (and subsequent search incident) was proper.

NOTE: *In the dissent, it was observed that "however one may want to parse the facts in this case, the weapon here was immediately recognized by Officer Bowles as such as soon as he pointed his flashlight into the" car. Forcing the public to keep an otherwise lawfully carried weapon in open view might "lead to … a scary practice of people driving around in public places with their weapons laid out on their dashboards for extreme visibility purposes – quite an unnerving sight for a lot of families and viewers in this day and age."*

NON-PENAL CODE

Welch (Marty and Madeline) v. Com., 2014 WL 1016088 (Ky. App. 2014)

FACTS: In February, 2008, the Johnson County SO seized a Tahoe in connection with a drug investigation. The vehicle was towed by Welch's company, as part of the usual rotation of tow companies. Initially the Sheriff's Office intended to seek forfeiture, but discovering a lien against the vehicle in a high amount, it elected to let it go back to the defendant or to the lending company. Sometime later, Welch released it to a person supposedly associated with another towing service.

In January, 2009, GMAC, the lender, filed an action against the Sheriff's Office and the Welches. The Sheriff's Office was dismissed on sovereign immunity. GMAC and Welch did a stipulated dismissal as Welch claimed he did not have the vehicle. However, some two months later, the vehicle was returned to Welch by the other towing company. In December, 2009, Madeline Welch bought parts and a title associated with a 2008 Yukon, other parts from it were sold to others. She brought in a vehicle to the sheriff's office for a rebuilt vehicle inspection and obtained a title, for a vehicle with a VIN ending in 2432.

In January, 2010, KSP and the SO executed a search warrant on the Welch's company and seized several vehicles. They seized a Yukon with the VIN of 2432, but subsequently learned it was actually the Tahoe seized in the other case. They also found two Mustangs, one of which had a VIN that was connected with another stolen vehicle.

The Welches were charged with receiving stolen property and trafficking in stolen vehicles and parts. Their son, Ian, was also charged. The Welches were convicted of most charges and appealed.

ISSUE: Does changing the VIN suggest that the person in possession was aware a vehicle is stolen?

HOLDING: Yes

DISCUSSION: The Welches argued there was no proof that the Tahoe was stolen and in fact, contended that they were the rightful owner because of their legal interest in the vehicle for towing and storage expenses. Trooper Caudill testified that GMAC had a valid lien and was the "rightful owner in the absence of Sloane." Since no forfeiture was done, Sloane was never divested of his legal interest. The Court agreed that the dismissal was premised on his assertion that he did not have the vehicle, and in no way abrogated any rights held by GMAC.

The Court agreed that the Welches "took extraordinary measures to change the VIN" so as to disguise the provenance of the vehicle, and to make it "disappear" on paper. Further, the Court agreed that there was more than one stolen vehicle involved, therefore satisfying the requirement of KRS 186A.325.

The Court upheld their convictions.

DOMESTIC / FAMILY

Ingram v. Drotts, 2014 WL 891025 (Ky. App. 2014)

FACTS: At a DVO hearing, Drotts was awarded a DVO against Ingram. She alleged that Ingram had told her on multiple occasions that he wished she was dead and that if "she called the law about anything there would be a gun fight." On the day in question, he became angry about a project , began cursing and using abusive language, punched himself in the face and broke a bar stool. He rested his hand on his holstered firearm. Drotts locked herself and her children into a bedroom until he left. While on the way to her parents' home, she had a wreck and called Ingram. He became angry and blamed her for the wreck. He said he was glad the children were alright, but left open a threat that he was not happy she was unharmed. When she returned she worried he would shoot her, so she collected her belongings, with the help of law enforcement, and then moved to her parents' home. Ingram played a voicemail in which she was cursing him.

The DVO was entered and Ingram moved to reconsider. That was denied and he appealed.

ISSUE: Does the judge decide the credibility of witnesses in a DVO hearing?

HOLDING: Yes

DISCUSSON: Ingram argued that there was "no substantial evidence of domestic violence." The Court looked to the definition in KRS 403.720(1) and agreed that the family court was better suited to judge between the credibility of the two.

The Court upheld the DVO.

FORFEITURE

Fannin v. Com., 2014 WL 631662 (Ky. App. 2014)

FACTS: In 2011, Deputy Pelphrey (Johnson County SO) received a complaint that Fannin had "used counterfeit money to purchase pills." He worked with a CI to "orchestrate a bogus pill transaction." Fannin refused to hand over any money at the scene and he and the CI left, followed by the police. Along the way to the alleged dealer's home, Fannin was pulled over and searched. Officers found $1,100 in real cash and $150 in counterfeit bills. He was charged and convicted of Possession of a Forged Instrument. The Commonwealth sought forfeiture of the real cash found and the Court awarded the money to the state. Fannin appealed.

ISSUE: Is money intended to be used to purchase drugs subject to forfeiture?

HOLDING: Yes

DISCUSSION: Fannin argued that he received the money from a separate source, but the Court agreed that "the originating source of the money is irrelevant." It may have not been obtained as a result of a drug sale, but was logically intended to be used to purchase drugs.[2] The evidence indicated that "Fannin took the money with him on what he believed to be a drug transaction."

CONTROLLED SUBSTANCES

Mosley v. Com., 2014 WL 702188 (Ky. 2014)

FACTS: On the day in question, two officers responded to a Laurel County apartment complex on a complaint by a resident "of a strange odor in her apartment." They noted the odor was coming from the vents and localized it to the apartment above. The offices went upstairs, one to the front and the other to the back. Through a window, one officer saw "shadows of movement" inside. Occupants never responded to the knocks. The property manager unlocked the door, upon request, when told that the odor indicated a methamphetamine lab.

When the door was opened, the odor was so intense that it cause eye-watering and other effects. As they entered, Mosley and Elkins (the leaseholder) were getting out of the shower. Elkins gave consent to search and the officers found a number of items associated with methamphetamine manufacturing. Another individual, Hale, responded to collect, analyze and ultimately dispose of the material. He performed a number of tests but nothing tested positive for ammonia or pseudoephedrine – and further, none were found in the apartment.

[2] KRS 218A.410(1)(j).

Mosley was charged with manufacturing methamphetamine. She was convicted and appealed.

ISSUE: May seemingly innocuous items be used to prove methamphetamine production?

HOLDING: Yes

DISCUSSION: The Court noted that the relevant statute, KRS 218A.1432, requires that two or more chemicals or items of equipment be present. Certainly, many of the items listed are "common household items" – "so common, in fact, it would not be unreasonable to suppose that a majority of the homes in the Commonwealth contain many items that could be used to manufacture methamphetamine." However, it noted that everyone was not charged, because the law also requires proof that the possessor intended to so use said items. Mosely argued that there was no such proof.

The Court agreed that "the items found in the apartment, when taken without context, are seemingly innocuous." However, testimony indicated that the chemical smell in the apartment was associated with manufacture. Items found in a closet, road salt and sulfuric acid drain cleaner, are commonly so used and that altered plastic bottles, called "smoke bottles," were also linked to it. He noted that water in the toilet had a suspicious pH balance, suggesting something had been dumped and flushed, and that other items suggested they had been used in way that was not normal. The absence of evidence was not enough to warrant a directed verdict and the Court upheld her conviction.

SEARCH & SEIZURE – SEARCH WARRANT

Wilson v. Com., Ky. App. 2014

FACTS: On September 29, 2010, Todd parked his car at a Lexington restaurant. When he returned, he discovered that his car had been broken into and a number of items taken, including a handgun and an iPhone. He told police he could use software (Mobile Me) to track the telephone. Officer Fraser went with Todd to his home and they monitored the telephone, locating it apparently stopped in the area of a particular apartment complex. Officers responded to that location and the telephone was pinpointed to a particular wing. Officers walked in front of the apartments, listening for a ringtone, but heard nothing. Officer Fraser went to the scene and joined others walking the area, still listening for the ringtone. As Officer May was walking, with his head down, listening, he spotted 5 ammunition rounds on a lawn chair on what was later learned to be Wilson's patio. (The bullets appeared to match the weapon stolen.) He reached into the open patio and collected the rounds of .380 ammunition from the chair. After discussion, he returned and actually stepped onto the patio; he looked down into a partially open garbage can and spotted a GPS unit. Knowing one had been taken in the break-in, he turned it over to Officer Fraser. When it was turned on, it showed Todd's home address.

Officers secured both entrances of the unit. They knocked and no one answered. Wilson approached. The officers learned he lived there and told him why they were there, asking if anyone was inside. He said Powers might be in the apartment. They asked for consent and Wilson

refused. Wilson was detained while Officer Fraser left to get a warrant. Wilson, handcuffed while waiting, volunteered that he "had a little bit of weed in a safe." The officers decided to wait for the warrant, but when they contacted Officer Fraser, he stopped the warrant process and returned to get a signature on a consent form.

Powers then emerged. Wilson withdrew his consent after Powers told him something, so the Officer went back and did a search warrant. He did not include the information about the GPS due to concerns about the legality of its seizure. During the subsequent search, a weapon stolen from the vehicle was found. They found the phone in the woods near the apartment.

At a hearing, the apartment manager testified as to the officers' encounter with Wilson. In particular, it was mentioned that the trash can was likely completely closed rather than partially open. The trial court ruled that the bullets were properly collected having been spotted in plain view and the evidence presented in the warrant was sufficient.

Wilson took a conditional guilty plea and appealed.

ISSUE: May items seized unlawfully be saved by a valid search warrant obtained later?

HOLDING: Yes

DISCUSSION: With respect to the ammunition, the Court discussed the plain view requirements under Horton v. California[3] and Hazel v. Com.[4] The Court discussed the Dunn factors with respect to the porch/patio from where the GPS and ammunition were spotted.[5] The Court agreed that "the patio was adjacent to the apartment and enclosed on two sides" and "was used as an extension of the home's living space and was entered into from the home." As such, it was within the apartment curtilage.[6] The Court agreed the retrieval of the GPS was an illegal search, as even if the trash can was open the contents could not have been seen by anyone until they entered that private, albeit open to view, space. With respect to the ammunition, accepting that it was lying on the chair (as the officer stated), the Court noted that the question was "whether the police officer had a lawful right of access to the object itself, that is, could he under the plain-view exceptions, reach in and retrieve the bullets while breaching the patio space." The Court agreed that clearly the situation met the first elements of plain view, and the officer "adamantly stated that when he picked up the ammunition, he never stepped onto the patio." However, the Court noted it was not clear that the ammunition was, in fact, contraband. The Court ruled that the seizure of the ammunition was illegal.

With respect to the search warrant, the Commonwealth argued that since the GPS unit and the ammunition were not used to support the warrant – the only mention of the ammunition related to an officer viewing it – the Court agreed that it was sufficient to support it. Finally, in a "somewhat circular argument," the Commonwealth argued that the items would have inevitably been found

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[3]

[4] 833 S.W.2d 831 (Ky. 1992).

[5] U.S. v. Dunn, 480 U.S. 294 (1987)

[6] See Trevathan v. Com., 384 S.W.2d 500 (Ky. 1964).

with the search warrant. The Court agreed that under Nix v. Wiliams[7] and Murray v. U.S.[8], items may be seized if the "lawful seizure is genuinely independent of the earlier, tainted one." In this case, since the officers had probable cause for the search, they "would have inevitably recovered the suppressed evidence."

With respect to statements Wilson made about the marijuana, while in custody but not having been given warnings, the Court agreed that the questions being asked were those "normally attendant to arrest and custody."

The Court upheld the convictions.

SEARCH & SEIZURE - CONSENT

Beckham v. Com., 2014 WL 1155324 (Ky. App. 2014)

FACTS: On April 25, 2009, Deputies Boggs and Whalen (Boone County SO) were on bike patrol in a trailer park. At about 10:20 p.m., they smelled marijuana near one of the trailers. They noted that the front door was open, although the outer storm door (which was a screen at the top) was not. The deputies walked along the boundaries and concluded the smell was coming from that trailer. They approached to do a knock and talk and the odor became more pungent. Beckham answered their knock, his eyes were "bloodshot and dilated." Boggs advised Beckham that they smelled the marijuana – Beckham refused to step outside. He also refused the deputies' entry and stated he wanted to talk to his attorney. "Boggs told Beckham that was okay, but that he would be detained while one of the officers obtained a search warrant." Beckham fled into the interior of the trailer and the deputies assumed he was going to destroy evidence. Boggs kicked his way in and found Beckham in the living room, "stuffing items into his pockets." Deputy Whalen did a protective sweep and put Beckham on the couch. They saw marijuana and paraphernalia in plain view but did not search until they obtained a search warrant.

Beckham was charged with trafficking in marijuana and paraphernalia. He moved for suppression, which was denied. He took a conditional guilty plea and appealed. The Court of Appeals then reversed the decision and remanded the case, relying on King v. Com.[9] Shortly after that, the U.S. Supreme Court reversed the decision in King and remanded the case, rejecting "the reasonable foreseeability test" as it applies to the split second decisions made by law enforcement. The Court held "that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment" – and that knocking on the door did not violate King's rights. The Commonwealth sought review and the Court of Appeals vacated that decision, remanding the case for further proceedings.

ISSUE: Is it proper to seek consent even if an officer already has sufficient information for a search warrant?

HOLDING: Yes

[7] 467 U.S. 431 (1984).
[8] 487 U.S. 533 (1988).
[9] 302 S.W.3d 649 (Ky. 2010).

DISCUSSION: The Court recognized the legitimacy of "the investigatory tactics of police officers working in the field, including an officer's legitimate decisions to initiate contact with a suspect before seeing a search warrant, whether in an effort to obtain consent to search or gather additional information in furtherance of the investigation." As such, the Court agreed, it was proper for the deputies to knock on the door, even though they did, in fact, already have enough to seek a search warrant, and that they did not gain entry improperly, either. Their entry was premised on a legitimate concern that Beckham was intending to destroy evidence of his crime.

The Court concluded "that Beckham's decision to run created an exigency that evidence was about to be destroyed" – which justified the deputies' entry to secure him and preserve the evidence.

The Court affirmed Beckham's plea.

Taylor v. Com., 2014 WL 1155400 **Ky. App. 2014**

FACTS: On May 14, 2010, Taylor was living with his aunt and uncle in Fulton. On that day, law enforcement arrived and arrested Taylor, who was on the front porch smoking marijuana. His aunt was on parole and parole officers gained her consent to search the house. In Taylor's bedroom, they found a pistol and cocaine, and Taylor was charged. Taylor argued that Diane's status did not give her the right to give consent to search his room, the prosecution argued that the door was not locked and nothing suggested that the room was exclusively his. (Testimony indicated that Diane had told them the bedroom was Taylor's and his wallet and ID were on the dresser.)

Taylor was convicted of drug and weapons charges, and appealed.

ISSUE: May the owner of a house give consent to a search of the master bedroom (even if later learned that someone else occupies it)?

HOLDING: Yes

DISCUSSION: Taylor continued to argue that "Diane could not consent to the search of his bedroom." The door was not locked but, he alleged, was closed. It was the master bedroom, however. The Court agreed that there was no "specific indication that the room was solely Taylor's."

In addition, Taylor argued that a statement was offered by Sgt. Buckingham, at trial, which had not been disclosed prior to trial. The Court agreed that RCr 7.24 obligated the Commonwealth "to inform the defense of its knowledge of the incriminating statement." However, the Court agreed its admission was harmless.

Nonetheless, the Court did agreed that the trial court improperly allowed a detective to repeat what Taylor had said about his control of the master bedroom in a suppression hearing, at trial, and that it was inadmissible hearsay. For that reason, the Court reversed Taylor's conviction.

SEARCH & SEIZURE - PROBATIONER

Bratcher v. Com., 424 S.W.3d 411 (Ky. 2014)

FACTS: While investigating Zguro, Officer Gibson (Muhlenberg County) learned that Bratcher "had at his home items used to manufacture methamphetamine" and that he was planning a cook. The officer had "independent knowledge" of Bratcher's "prior criminal activity." Along with another officer, he went to Bratcher's home and requested consent to search, which was refused. Officer Gibson contacted Moore, Bratcher's parole officer, from the scene and told her what he knew. Moore reminded Bratcher (via the phone) that he was obligated to allow parole officers to search his home and that he "should consent." Bratcher did so.

Officers Gibson and Newman (a parole officer who was closer to the scene) then searched, finding a number of incriminating items. Bratcher was charged with manufacturing methamphetamine and PFO. Before trial, he argued that the search violated his rights, as Officer Newman lacked sufficient information to find "reasonable suspicion," which was required by agency policy to force the search. The trial court disagreed and denied the suppression motion. Bratcher took a conditional guilty plea and appealed.

ISSUE: Is reasonable suspicion required for a search of a parolee's residence?

HOLDING: No

DISCUSSION: Bratcher argued that because the parole officers were never given the source of Gibson's information, they "could not have properly assessed the veracity of the information to form reasonable suspicion." Without that, it was an invalid search. The Court looked to U.S. v. Knights[10] which required reasonable suspicion before a probationer search is done; this was extended to parolees by Riley v. Com.[11] More recently, in Samson v. California, the court had compared the two different statuses, however, and upheld the reasoning that law enforcement may conduct a suspicionless search of a parolee.[12] Thus, while reasonable suspicion is the standard for a probationer's residence, "there is no analogous requirement under the federal constitution for the search of a parolee's residence."

The Court agreed that while the Kentucky Department of Corrections might impose a stricter standard on its officers, that does not alter the Fourth Amendment analysis and a search prohibited by policy would not invoke the Exclusionary rule.

The Court upheld the denial of suppression.

Helphenstine v. Com., 423 S.W.3d 708 (Ky. 2014)

FACTS: Helphenstine's parole officers received an anonymous tip that he was using and manufacturing methamphetamine at his rental house. A week later, they paid a visit to his residence, meeting the landlord at the house. The landlord asked them to search "because of suspicious activity and people around the house." Both Helphenstine and the landlord gave written consent to a search. The search produced evidence of manufacturing, so the Grayson County

[10] 534 U.S. 112 (2001).
[11] 120 S.W.3d 622 (Ky. 2003).
[12] 547 U.S. 843 (2006).

Sheriff's Office was contacted. Two deputies arrived to help with the handling of the substances, as an active one-step lab was located.

Helphenstine was charged with manufacturing methamphetamine. He moved to suppress, arguing that the parole officers did not have reasonable suspicion to search and that the consent covered only the parole officers, not the deputy sheriffs. He also argued for suppression of the lab results. When his motions were rejected, Helphenstine took a conditional guilty plea and appealed.

ISSUE: May a parole officer call upon other officers to help in a search?

HOLDING: Yes

DISCUSSION: The Court noted that as a parolee, Helphenstine's expectation of privacy was diminished but not extinguished. A parole officer is permitted to search without a warrant, with reasonable suspicion of wrongdoing. And of course, a search may also be done with consent. The Court found no reason to depend upon the former because it found clear reason to depend upon the consent. His parole officers were permitted to visit his residence (but not necessarily search) and speak with him at any time. He gave written consent to the parole officers "and such other officers as may assist them." The deputies were contacted to help collect and dispose of dangerous substances which were likely beyond the scope of training for the parole officers. As such, it was entirely reasonable for them to seek trained assistance. The consent, and the search, was valid.

Helphenstine also challenged the chain of custody, arguing that "photographs must be taken of the site where drugs are collected" and none were produced. He also complained that the testing completely destroyed the material so he was not able to have them tested. The Court noted that it had found "no case law to indicate that police are required to take pictures of a crime scene in order to authenticate evidence taken from that crime scene." Certainly, given the volatile nature of such labs, a failure to take photos is understandable. The Court agreed that in this case "there is a dearth of information documenting where the evidence was located and how it was collected or tested" leaving an imperfect chain of custody. However, a perfect chain of custody is not critical, "so long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered in any material respect." Problems with the chain of custody go to the "weight of the evidence rather than its admissibility."[13] Helphenstine had a chance to challenge it but chose instead to take a plea, and the Commonwealth was not then required to prove it.

Helphenstine's plea was upheld.

SEARCH & SEIZURE - EXIGENT ENTRY

Hall v. Com., 2014 WL 505581 (Ky. App. 2014)

FACTS: On September 28, 2011, a USPS branch was doing a "routine search for suspicious packages." They came across a package that appeared to be from a California business and contacted the business. It could not verify if it sent the package, but gave permission to open it. Inside, the inspector found about 12 pounds of marijuana. It bore a Lexington address, but the agent could find nothing about the individual named on the package, learning inside that a woman

[13] Rabovsky v. Com., 973 S.W.2d 6, 8 (Ky. 1998) (quoting U.S. v. Cardenas, 864 F.2d 1528, 1532 (10th Cir. 1989)).

named Henderson lived there. Det. Smoot, Lexington PD, was contacted. Together, they resealed the package and went to the address, intending to do a "knock-and-talk." The address was a duplex. No one answered on the side the address indicated but the occupants on the other side responded. They owned the building and confirmed that Henderson lived in the suspect address with her young child. They did not recognize the name on the package, but confirmed that they had, twice before, accepted packages addressed to someone other than Henderson.

One of the landlords unlocked Henderson's door and yelled for her, she then came to the door. Det. Smoot told her that he smelled marijuana and was going to come inside. Henderson took him to her bedroom and directed him to a dresser drawer and a baggie containing about 2.5 grams of marijuana. They went to the kitchen and she was questioned. She denied knowledge of the package, initially, but finally admitted she'd accepted for Hall. Hall showed up at the house during that time, he denied knowledge of the specific package but admitted to have picked one up before. Both were charged with trafficking in marijuana.

Hall moved to suppress the package and the statements he made. That was denied. He took a conditional guilty plea and appealed.

ISSUE: May the apparent sender of a package consent to its search?

HOLDING: Yes

DISCUSSION: Hall argued that the USPS agent did not have the right to open the package on the basis of the business's consent. The Court agreed that since the business was indicated as the sender and regularly shipped through the mail, it was appropriate to consider that they had the authority to consent.

Hall also argued that the officers "impermissibly entered Henderson's home." The Court agreed that the knock-and-talk was permitted but held that the "landlord did not have the authority to open the door. It noted that KRS 383.615 specifically denied the landlord the authority to do so, except in case of emergency. The actual evidence was already in the possession of the officers, who certainly had enough to seek a warrant. The argument that the "plain smell" of the marijuana inside was an "exigent circumstances" does not apply "when or if the police themselves create the exigent circumstances and then attempt to act upon them in violation of the Fourth Amendment."[14] Absent the landlord unlawfully unlocking the door, they would not have smelled the marijuana. The Court ruled that the officers "wholly exceeded their authority in persuading or even permitting the landlord to conduct an illegal entry and then to bootstrap their own illegal entry on his alleged 'third-party' consent." Further, the detective testified that "he told Henderson that he had probable cause to enter and went into the residence without her consent."

The Court affirmed that part of the trial court's order with respect to the package, but reversed that which concerned the evidence found in and as a result of the search of Henderson's residence.

SEARCH & SEIZURE – SWEEP

Carter v. Com., Ky. App. 2014

[14] Kentucky v. King, 563 U.S. --- (2011).

FACTS: On December 10, 2011, Deputy Stratton (McLean County) received an anonymous tip that Carter was growing marijuana at his home. The tip was detailed. Deputy Sheriff contacted Det. Conley (KSP) and together they went to do a knock and talk several days later. In the process, a neighbor told them "that he had noticed a strong chemical odor coming from Carter's property and that there were frequently people coming and going in and out of the property." They approached him on the front porch and Conley spoke to him, with Stratton standing near the garage. They could hear a radio inside but "observed no affirmative indication that the home was occupied by anyone other than Carter."

Det. Conley saw three dead ducks on the porch and asked how he'd killed them – Carter, a convicted felon, admitted he'd used a shotgun. He stated first that the gun was at his mother's home but finally admitted it was inside his own house and offered to get it. Instead, the officers asked to search the residence and Carter refused. He was arrested for possession of the weapon. He again denied permission to search.

The two discussed whether a sweep was appropriate, even contacting the county attorney for advice. The County Attorney agreed that a protective sweep was appropriate. Inside they saw "firearms, ammunition, and marijuana plants in plain sight." With that information they sought a search warrant. When it was executed, substantial additional evidence was found.

Carter was charged with drug and firearms offenses. He moved to suppress the evidence found in the home. That was denied and he took a conditional guilty plea. He then appealed.

ISSUE: Is some evidence that someone else is in a house necessary for a protective sweep?

HOLDING: Yes

DISCUSSION: The Court reviewed the doctrine of a "limited protective sweep in conjunction with an in-home arrest."[15] As adopted in Guzman v. Com., Kentucky defines a "permissible protective sweep to include all or part of an individual's home when officers possess an objectively reasonable belief that the residence may be harboring a dangerous person."[16] Guzman was further fleshed out in Kerr v. Com., in which the court recognized that Buie actually develops two different types of sweep search, the first "allows officers ' as a precautionary matter and without probable cause or reasonable suspicion [to] look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched"' and the second which "allows officers to undertake a broader search of places not adjacent to the place of arrest if there are 'articulable facts, which taken together with the rational inferences from those facts, would warrant a reasonable prudent officers in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."' Kerr focused on the first prong, while Brumley v. Com.[17] addressed the second.

[15] Maryland v. Buie, 494 U.S. 325 (1990).
[16] 375 S.W.3d. 805 (Ky. 2012).
[17] 413 S.W.3d 280 (Ky. 2013)

The Court noted that this situation was more akin to the second prong, and looked to Brumley for guidance. In both Brumley and Carter', the subjects were outside the residence when arrested. In both cases, officers understood that there were weapons inside, but the Court agreed that the "mere presence of guns … does not automatically rise to the level of reasonable suspicion that would justify a protective sweep." The Court found no facts that would support any threat to the officer.

The Court continued, however, finding that the drug evidence would have inevitably been discovered when they went inside to retrieve the firearm – and the information they had would have justified obtaining a warrant to do so. As such, the Court affirmed the denial of the motion to suppress.

DeCoursey v. Com., 2013 WL 4511937 (Ky. App. 2014)

FACTS: On January 22, 2011, Det. Berghammer (Christian County SO), along with two deputies, went to a home to serve arrest warrants on DeCoursey and Atwell. When they arrived, Det. Berghammer "smelled a strong chemical odor emanating from the house and noticed security cameras on its exterior." No one answered his knock. Two vehicles were in the driveway and a fan was running in the attic. Det. Berghammer spotted two "smoke bottles," associated with methamphetamine production, "laying outside the residence."

Det. Berghammer contacted the Commonwealth Attorney's Office and then approached the residence. Before he could force entry, DeCoursey came to the door and opened it. Det. Berghammer smelled a combination of ether and anhydrous ammonia; the deputies immediately secured DeCoursey and swept the residence. One subject was hiding in the bathtub and the other in a back bedroom closet. The deputies saw, in plain view, items used in methamphetamine production. Det. Berghammer sought a search warrant as a result of what was observed.

DeCoursey was indicted for manufacturing methamphetamine. He moved to suppress, which was denied. DeCoursey took a conditional guilty plea and appealed.

ISSUE: Might the apparent presence of a methamphetamine lab justify a sweep?

HOLDING: Yes

DISCUSSION: The Court noted that the deputies did not do a full search, but "rather did a sweep of the residence and waited to search the entirety of the residence until after securing a warrant." The Court agreed that this situation satisfied the exigency exception, and that "plain smell" applied. Further, it noted that it "is well settled that an active methamphetamine lab presents a significant danger both to the public and the police because of the high risk of explosion and exposure to toxic fumes." In fact, the Court said, they could have done a much more complete search than they did, but instead, they prudently confined the search to a sweep and then sought a search warrant.

The Court upheld DeCoursey's plea.

Brown v. Com., 423 S.W.3d 765 (Ky. App. 2014)

FACTS: On February 15, 2012, "a victim notified Lexington Police that three men had assaulted her at gunpoint." She knew the men and identified Brown as the person with the gun. She reported to 911 where Brown lived and that all three men had gone in that direction. She stated that they had guns there and mentioned an AK-47.

Officer Raker, arriving first, waited for other officers, and eventually 6-7 officers were present. They surrounded the location and order the occupants out. Two females emerged, followed by three men. They separated and frisk all the parties, and then questioned them. They reported no one else in the home. Officer Raker, acting without knowledge of that, did a sweep of the home with two other officers. They found no persons but did find a handgun, an AK-47 and other items in plain view. Brown was charged with a number of offenses and requested suppression. Officer Raker agreed that they had no reason to believe anyone else was inside and that officers questioning the men would have known they were the three suspects. However, he and the other officers did not question the individuals. The trial court agreed that they had conducted a legal protective sweep and "the fact that more people had come out of the home than the three police expected." As such, it was reasonable to believe more might be inside.

Brown took a conditional guilty plea to a lesser change and appealed.

ISSUE: May the totality of the circumstances justify a sweep search?

HOLDING: Yes

DISCUSSION: The Court looked to the case of Maryland v. Buie[18] which had only recently been adopted in Kentucky, in Guzman v. Com.[19] The Court further discussed it in Brumley v. Com.[20] and U.S. v. Colbert.[21] These cases agreed that in a search of a premises not connected to an immediate arrest, officers require at least an articulable suspicion that someone was still lurking in the area. In this case, even though the arrest took place outside, that did not preclude the Buie search, but only weighed as a overall factor. The Court emphasized the need to "consider the totality of the circumstances and whether the facts, taken together, might have caused a reasonable officer to have an articulable suspicion of danger."

Looking to the information available to Officer Raker, the officers knew that three men were involved in the crime and three men emerged from the house. The officer "cited his general concern for officers' safety as the sole reason for the sweep." The Court agreed it took more than "ignorance or a constant assumption" that someone else might be in the house to justify a sweep, however.[22] Although they were aware of guns in the house, the officers "admittedly possessed no reason to believe anyone remained inside the home to use those weapons against them." It is the presence of people, not weapons, that is critical.

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[18] 494 U.S. 325 (1990).
[19] 375 S.W.3d 805 (Ky. 2012).
[20] 413 US.W. 3d 280 (Ky. 2013).
[21] 76 F.3d 773 (6th Cir. 1996).
[22] U.S. v. Archibald, 589 F.3d 289 (6th Cir. 2009).

The Court concluded that it "once, again and quite rightly, recognizes that officers often face dangerous conditions, difficult decisions, and scarcely a second's time to negotiate both." However, "in this case, on this facts" it found no articulable reason to believe there was any danger.

The order of the trial court was reversed and the case remanded.

SEARCH & SEIZURE – TERRY

Harris v. Com., 2014 WL 97397 (Ky. App. 2014)

FACTS: On August 31, 2001, Officer Arnberg (Newport PD) heard Officer Tyson make a traffic stop. He responded to provide backup. Three occupants were in the stopped minivan, with Harris in the rear passenger seat by the sliding door. Officer Arnberg was told Harris was unable to provide any form of ID, so Officer Arnberg had Harris get out and began questioning him.

Harris admitted to having prior drug convictions, so the offices asked if he was carrying any drugs or weapons. He denied it and consented to a frisk, nothing was found. Officer Arnberg noted that Harris "was not speaking normally and appear to have something in his mouth." He opened his mouth on request and the officer saw nothing. He then asked Harris to life his tongue and he did so, but "rolled his tongue over to the side." Asked again, Harris tipped his head back, which prevented the officer, who was shorter, from seeing inside. He finally complied and Arnberg was able to see "the corner of a small clear baggie with something white inside of it." Officer Arnberg's training allowed him to immediately recognize what he was seeing and he directed Harris to spit it out. He refused and also refused to open his mouth again. Officer Arnberg placed a hand on Harris's neck in an attempt to keep him from swallowing it, but was unsuccessful. He admitted, after being arrested, that the baggie had 2-3 Xanax pills.

Harris was indicted for Tampering with Physical Evidence and for possession of marijuana found near him in the van. (The marijuana charge was dismissed.) He moved for suppression of his admission and was denied. He said the officer did not have reasonable suspicion that he had the drugs in his possession and thus beyond the scope of what was permitted. Harris was convicted and appealed.

ISSUE: Does the prior record of a subject, standing alone, justify a Terry stop?

HOLDING: No

DISCUSSION: The Court noted that the initial traffic stop was lawful and not at issue, as was having Harris get out of the vehicle. The Court noted that the "prior record of a suspect, standing alone will not justify a Terry stop."[23] There was no allegation that Harris was suspected to be armed and he cooperated by consenting to a frisk. At the time the officer, acting on a hunch, did not initially see anything in Harris's mouth, the "detention should have ended." [24] Anything after that point, the Court agreed, "violated the Fourth Amendment," and as such, his admission should have been suppressed.

[23] Collier v. Com., 713 S.W. 2nd 827 (Ky. App. 1986).
[24] U.S. v. Sokolow, 490 U.S. 1 (1989).

The Court reversed the decision of the trial court and remanded the case.

SEARCH & SEIZURE – VEHICLE STOP

Spencer v. Com., 2014 WL 1016095 (Ky. App. 2014)

FACTS: Spencer was stopped, and subsequently arrested on a variety of charges, in Fayette County. During the course of an unchallenged traffic stop, he was found to have a suspended OL and arrested. During the course of the subsequent search, he was found in possession of marijuana and other drugs. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Should reasons supporting a custodial arrest, rather than a citation, be placed on the record?

HOLDING: Y es

DISCUSSION: Spencer argued that he should have been cited, rather than arrested, under KRS 431.015(1). Because that was not ruled upon by the trial court and reasons for affirming the arrest placed on the record either supporting or denying the suppression motion, the Court vacated the judgment and returned to the trial court.

Willoughby v. Com., Ky. App. 2014

FACTS: On November 18, 2010, Officer Hardcorn (Kenton County PD) encountered a vehicle. He entered the license plate into his MDT and it came up as a "verify proof of insurance." Officer Hardcorn later testified that more often than not, in his experience, that indicated the person had either cancelled their insurance or it was otherwise lapsed. The County Clerk indicated that there were several possible reasons for this notification, including that smaller insurance agencies didn't upload data as often as larger companies.

Officer Hardcorn made a traffic stop. Willoughby was driving and he was asked for the insurance card. A female passenger, Martin, was also in the vehicle. Willoughby searched for the card while the officer "shone his flashlight around the car and into the windows." He spotted an electric coffee bean grinder in the backseat. After five minutes, with Willoughby still looking, Hardcorn returned to his cruiser and asked for warrant or other information. He also asked to check a database of recent pseudoephedrine purchases and purchasers. After confirming that both had purchased it that day, with Martin only minutes before, the officer returned to the car and started questioning Willoughby. He denied it, stating also that he wasn't "into that anymore." He had Willoughby get out and told him that he was being given a warning for no insurance. (In fact, he had insurance, just no proof of it.) Officer Hardcorn and Sgt. Benton did a "pat down" … "which yielded two small bags of white powder, one of which was found tucked down his pants and between his buttocks." He was handcuffed and asked for consent to search the vehicle. "After reading Willoughby his Miranda rights, Officer Hardcorn repeatedly informed him that he was not under arrest." Officer Hardcorn later testified he received consent, which Willoughby denied.

In searching the car, they found evidence of methamphetamine manufacturing, and field testing indicated the powder found on Willoughby was also methamphetamine. He was arrested.

Willoughby sough suppression and was denied. He was convicted and appealed.

ISSUE: Is a stop based upon a computer "hit" that a vehicle may not be insured valid?

HOLDING: Unknown (see discussion)

DISCUSSION: The Court looked at each of Willoughby's arguments, in turn. First, the Court looked to the reasonableness of the traffic stop. It noted that although it had "no doubt that individuals are stopped every day on the sole basis of verifying their insurance coverage, this case presents what we believe to be an issue of first impression in this Commonwealth: Does an indication from AVIS or other similar database, that an individual's insurance 'requires verification' provide law with a reasonable and objective suspicion sufficient to conduct an investigatory traffic stop?" It looked to other jurisdictions for guidance. The Court noted that those cases "reveal a direct and imperative link between AVIS's ability (or inability) to accurately indicate illegal conduct and the existence of a reasonable and objective suspicion of such conduct." The County Clerk indicated that there could be several reasons in which that indication would appear, yet the individual still be legally insured. The officer stated that "more times than not" in his experience, the individuals were not insured, but the Court was troubled by "what level of reliability must a database reach to induce a reasonable and objective suspicion and thereby pass constitutional muster?" As the Court was going to remand the case, it directed, on this issue, that the trial court seek further proof on the following specific issues: "What the various indications provided by AVIS mean, both in theory and in practice; whether the database's 'match rate' can be definitively determined; and how (in)frequently an indication of 'verify proof of insurance; indicates that a vehicle is uninsured." The Court did not provide any threshold, but left it "to the sounds, and soon-to-be-more informed, judgment of the trial court," as to how much was enough.

Willoughby also argued that the officer's use of AVIS violated Kentucky law, pointing to KRS 186A.040. The court noted that the Driver's Privacy Protection Act, to which the statute alludes, "prevents the unauthorized disclosure of certain personal information."[25] It does not, however, preclude the use of information on the driver's insurance status. Further, the Court noted, and "more persuasively, Officer Hardcorn was not a person from whom the Act intended such information to be withheld."

With respect to the length of the stop, the Court noted that within the first 20 minutes, the officer had made a number of observations and discoveries that contributed to his suspicion. The additional bit of information, about the occupants' recent purchase of pseudoephedrine, came just after the 20 minute point and justified further detention. The Court found the time reasonable.

With respect to the search, the Court noted that even though Willoughby was told he was not under arrest, his circumstances indicated that "regardless of Officer Hardcorn's repeated assurances, Willoughby was under arrest." The question as to whether the search was incident to the arrest was immaterial, however, as it was valid under another doctrine, that known as a "vehicle exception

[25] 18 U.S.C. 2721 et seq.

[Carroll[26]] search." The Court agreed the officer had sufficient evidence to reach the probable cause level required by that doctrine.

The Court remanded the case for further information on the reliability of an AVIS indication on insurance, with a note that if that was upheld, the remainder of the ruling would be affirmed.

Carr v. Com., 2014 WL 891263 (Ky. App. 2014)

FACTS: Officer Madison, Louisville Metro PD, made a traffic stop of Carr on I-65. His radar indicated Carr was going 83 mph in a 55 mph zone. When he approached, Madison smelled alcohol and observed Carr's eyes were red. Carr admitted that he'd just had two beers. Madison administered FSTs (HGN, "walk and turn" and "one leg stand.") and concluded that he was impaired. A PBT indicated the presence of alcohol. The video recording of the stop was played during a suppression hearing.

The defense argued that Madison did not administer the tests in compliance with NHTSA. Further, it argued that Madison gave the PBT within 12 minutes of the stop, rather than the required 15. The Court granted the suppression from the bench and rationale was put on the record orally.

The Commonwealth appealed the suppression ruling, arguing there was probable cause for the arrest. The Circuit Court reversed and remanded the case back. Carr appealed.

ISSUE: May a finding of probable DUI be supported by the totality of a set of circumstances?

HOLDING: Yes

DISCUSSION: The Court noted that upon review of the suppression hearing, "it appear[ed] the district court believed that each piece of evidence, by itself, was not sufficient to support a finding of probable cause."[27] The Court found that process to be improper and that instead, the "totality of the evidence" suggested Carr was operating under DUI.

The Court upheld the reversal of the trial court's suppression.

Mickey v. Com., 2014 WL 1268690 (Ky. App. 2014)

FACTS: On August 29, 2011, in Fayette County, Trooper Collins (KSP) observed a vehicle, driven by Mickey, that had an expired registration tag. Upon being asked for his OL, Mickey responded it was suspended. Trooper Collins ordered Mickey out of the vehicle and as he was preparing to handcuff him, the trooper "detected a faint odor of marijuana." As a result, the trooper "believed he possessed probable cause to search the vehicle." He subsequently also discovered Mickey had two outstanding warrants. Trooper Collins searched the vehicle and found "cocaine, drugs and drug paraphernalia."

[26] Carroll v. U.S., See also Chavies v. Com., 354 S.W.3d 103 (Ky. 2011); Pennsylvania v. Labron, 518 U.S. 938 (1996).
[27] U.S. v. Arvizu, 534 U.S. 266 (2002).

Mickey moved to suppress the evidence from the vehicle; that motion was denied. Mickey took a conditional guilty plea and appealed.

ISSUE: Is a search based upon evidence only revealed as the result of an improper arrest valid?

HOLDING: No

DISCUSSION: The Court noted that "in this case, two exceptions to the warrant requirement are relevant – the automobile exception and the search incident to arrest exception." In looking at "the unique facts of this case," the Court ruled that "neither exception is applicable and a warrant was necessary for the search."

First, the Court looked at the vehicle exception, which applies "where the automobile is readily mobile and there is probable cause to believe the automobile contains evidence of criminal activity."[28] The Court noted that the Trooper arrested Mickey for driving on a suspended OL, even though KRS 431.015 required "that a mere citation be issued for such violation." As such, he was unlawfully arrested. Since the trooper only smelled the marijuana when he ordered Mickey out of the car and that the trooper was unsure about the source of the odor, the odor could not "constitute grounds to form probable cause for a search of the vehicle." The trial court had relied upon Dunn v. Com., in which the court had upheld a search based upon the smell of marijuana detected during a traffic stop.[29] The Court distinguished it, however, noting that in Dunn, the odor was detected simply when the window was cranked down during the stop.

In looking at the case as a search incident to arrest, the court noted that once an arrested subject is secured, any search cannot be based upon the first provision of Arizona v. Gant.[30] The Court did not address, however, whether it might be justified under the second provisions, as the opinion did not provide any information about the reason for the outstanding arrest warrants.

The Court vacated the plea and remanded the case.

Heath v. Com., 2014 WL 891264 (Ky. App. 2014)

FACTS: On August 23, 2010, Trooper McPherson (KSP) and Deputy Albro (Muhlenberg County SO) set up a traffic checkpoint in Muhlenberg County. It was at a pre-approved location, was approved by a commander, lasted under 60 minutes and involved stopping all motorists that passed by the location, in both directions. It was clearly visible to approaching vehicles and both men were in uniform and had vehicles lighted. At about 1:19 a.m., Heath approached and stopped. Deputy Albro checked Heath's registration and OL, Trooper McPherson observed that Heath's pupils did not dilate when a flashlight was shined on him. The trooper knew, through training, that was an indication that he might be under the influence of drugs, but when Heath was asked, he denied being under the influence. The trooper had received a tip about Heath

[28] Chavies v. Com., 354 S.W.3d 103 (Ky. 2011).
[29] 199 S.W.3d 775 (Ky. App. 2006).
[30] 556 U.S. 332 (Ky. 2009).

purchasing the monthly legal limit of pseudoephedrine in recent months, so he did a quick "methcheck" and confirmed that information. [31]

Trooper McPherson had Heath get out, and frisked him. He found brass knuckles in Heath's back pocket and two pills in the front. Both were easily recognized during the frisk, although of course, the trooper could not identify the pills immediately. He removed them from Heath's pocket and immediately recognized them as Lortab, for which Heath had no prescription.

Trooper McPherson attempted to put Heath through field sobriety tests, he failed the HGN and refused to perform any other tests, "claiming he had chronic back pain and feared further injury." In searching his vehicle, the trooper found a pipe containing methamphetamine residue. Heath was taken to the hospital, where he refused blood and urine samples. He was taken to jail where he was charged with DUI (drugs), possession of drug paraphernalia and having a controlled substance not in original container. Since the arrest occurred at the end of the trooper's shift, he did not log the items into evidence until late the next morning. In further searching the camera case he had seized, in which he had found the pipe, the trooper found additional evidence that tested positive for methamphetamine. Additional charges were placed for possession.

Heath filed for suppression which was denied. He took a conditional guilty plea and appealed.

ISSUE: Are multiple indicators found during a traffic stop sufficient to prolong the stop?

HOLDING: Yes

DISCUSSION: First, Heath challenged the validity of the checkpoint. However, because he did not properly challenge it prior to the proceeding in which he took the conditional guilty plea, the Court noted that the "would have been permissible … if instituted for the purpose of 'traffic safety'" as was continuously referenced in the record.[32] There were no questions directed to the trooper "about what KSP hoped to achieve with the checkpoint and how its design was tailored to achieve the desired goal." The Court agreed that "trial courts should make explicitly findings on the record regarding a checkpoint's purposes, together with any conclusions drawn from those facts."

With respect to the frisk, the court noted that "prior to the frisk, Trooper McPherson knew four important facts—not just one. He knew Heath's eyes did not dilate when exposed to light; he knew fixed pupils were indicative of a person being under the influence of a combination of narcotics; he knew he had received a tip within the last sixty days that Heath was buying a large quantity of pseudoephedrine each month; and, the methcheck he had just performed in his cruiser confirmed Heath's monthly purchases of this key component in the manufacture of methamphetamine." The Court agreed that was enough to satisfy reasonable suspicion that Heath was engaged in criminal activity, impaired driving. Due to the amount of pseudoephedrine he was purchasing, it was reasonable to infer it was "involved in the drug culture." With that, and the stop taking place on a rural road at night, it was reasonable to do a frisk, as well.

[31] Heath claimed he'd been sick and needed it.
[32] Sitz

With respect to the pills removed from Heath's pocket, the court agreed that under the doctrine of plain feel, the trooper would have to recognize them immediately as contraband, which, of course, he could not do. However, when the trooper found the brass knuckles, a deadly weapon, he was then permitted to search Heath completely, and the pills would have been removed as part of the search incident to arrest.

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Finally, with respect to the search of the entire vehicle, the Court noted that Heath was putting forth a mistaken interpretation of Arizona v. Gant.[33] Under Gant, it was proper to search for evidence of the crime of arrest, even though at the time, Heath was secured in the cruiser. In Heath's case, it was proper for the trooper to search for the drugs that might account for Heath's fixed pupils.

Heath's plea was upheld.

SEARCH & SEIZURE – PRIVILEGED MATERIAL

Brown v. Com., 416 S.W. 3d 302 (Ky. 2013) (HELD OVER FOR FINALITY)

FACTS: On August 17, 2010, Brown agreed to sell Curd a large quantity of marijuana, something he'd done before. They agreed to meet at a location in Louisville. Brown asked for a ride from Grice. When they arrived, he got into Curd's vehicle and was "immediately surprised" to see another man in the car, Talbert. Talbert expressed concern about Grice, who was in the vehicle next to them. In response, Curd drove off. At some point during this "surprise excursion," Talbert pulled a gun and pointed it at Brown. Curd stopped the car and Brown jumped out, leaving the marijuana behind. He did stop to try to get his cell phone, which he'd dropped.

At this point, the situation was in dispute. Brown maintained that Talbert ordered him back to the car and that he drew his own gun and began shooting at the vehicle. Curd drove off and Brown continued to shoot. He hit Talbert, and Talbert subsequently died, and he also hit a nearby house.

Brown was indicted for murder, possession of the firearm, wanton endangerment and tampering. He was later charged with trafficking in marijuana over five pounds, and the firearms case dismissed. During the trial process, Brown sent several letters to local media outlets, claiming to be "unjustly imprisoned." He also made numerous admissions in the letters. The Commonwealth was unable to get the original letters by a subpoena to the media outlets and elected to seek a search warrant for his cell. Louisville Metro Corrections officers searched Brown's cell and seized 42 documents, which were given to the detective in the case. She emailed scans of the documents seized to the prosecutor and the defense counsel. Brown requested an in camera review by the judge, who subsequently sealed 24 of the documents as being protected by attorney-client privilege. The detective was prohibited from discussing the contents of the material with anyone. Brown moved to dismiss the indictments and was denied. He was convicted and appealed.

ISSUE May items be seized from a jail cell, even if potentially privileged?

HOLDING: Yes

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DISCUSSION: The Court looked to the case of Weatherford v. Bursey[34], for guidance on the issue of seizing potentially privileged material from a jail cell, and whether it violates that individual's right to counsel. In U.S. v. Steel, the Court detailed the four factors to consider:

> 1) whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was the result of other inadvertent occurrences; 2) whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant's intrusion; 3) whether any information gained by the informant's intrusion was used in any other manner to the substantial detriment of the defendant; and 4) whether the details about trial preparations were learned by the government.[35]

The Court agreed the detective's motive was proper, although the court doubted that the originals were, in fact, needed. The warrant specifically excluded privileged documents but the "officer who conducted the search testified that he had no training to distinguish between legal documents and other documents" – he simply collected everything. There was no prejudice shown by the seizure of the documents.

In addition, Brown argued that he was questioned after he requested an attorney. They Court reviewed the recording and agreed that while Brown mentioned an attorney, his request was ambiguous, couched in terms of "if" he wanted an attorney, asking how long it would take. From context, the Court garnered that Brown "only desired an attorney if the attorney could appear without delay."

Another issue arose with respect to the Commonwealth's use of an expert witness. The prosecution called a detective to testify with respect to a ballistics issue. No notice had been given to the defense and the Court agreed to delay the testimony until the next morning. It was argued that RCr 7.24 was violated by the Commonwealth failing to disclose the "identity of its expert witness along with the expert's anticipated testimony." However, the Court agreed, the defense did not request that information in writing, as required. The Court also ruled that the detective was testifying "based solely on their training and experience, not on scientific data." As such, the Court agreed that the detective's testimony was properly admitted as expert.

Finally, the Court addressed the admission of a portion of "The First 48" being admitted. In the clip, Brown "looked at the cameras with an at-ease demeanor and said "'Hello America,' and expressed that he was a fan of the show." The Court agreed this was relevant to rebut Brown's prior testimony that he was nervous was arrested and was "afraid he had left his girlfriend and child in danger." The Court agreed that the error, if any, was harmless.

In addition, Brown argued that the Commonwealth failed to redact portions of his recorded interview, although when given the final transcript to review, the defense council did not inform the trial court that requested redactions had not been made. As such, the interview that was played for the jury included a statement by one of the interviewing detectives as to what she thought Brown should have done (in effect, not go after the car and continue shooting). The Court agreed that it was "likely improper," but ruled that it did not believe it was critical to the resolution of the trial.

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[34] 429 U.S. 545 (1977).
[35] 727 F.2d 580 (6th Cir. 1984).

The Court affirmed Brown's conviction.

INTERROGATION

Guinn v. Com., Ky. App. 2014

FACTS: On January 14, 2010, Officer Vincent (Clay City PD) spotted a "loud ATV speeding on a street." He went after the ATV, losing sight of it, but following the sound. The sound stopped, but the officer drove around, finally spotting the ATV behind a house. He knocked on the door and Parrot answered. Officer Vincent entered and searched the house, finding Guinn hiding. He told Guinn to go and stand on the back porch. (Guinn did not live there, but "was related to the owners and frequently visited the home.") There he questioned Guinn, who confessed to driving the ATV and drinking, but did not give him Miranda warnings. Officer Vincent could not, himself, verify that Guinn was the rider, due to the speed of the ATV and the lack of light.

At some point, Guinn requested a Breathalyzer. Officer Vincent administered FSTs and a PBT, apparently, but not an Intoxilyzerm of course. He apparently requested, and Guinn refused, a blood test. Guinn moved for suppression, which was denied. The trial court ruled that Officer Vincent was in hot pursuit and properly entered the residence. The Court found it unclear whether Parrot agreed to the officer's entry, but ruled it was moot because Guinn lacked standing to challenge the entry as "he had no privacy interest in the house."

ISSUE: Does asking someone to wait on the porch for questioning make it custodial?

HOLDING: Not necessarily

DISCUSSION: With respect to his confession, Guinn argued that he was seized when he was told to go out onto the porch and stay, and was eventually told to go to the police car. The prosecution argued that he was allowed to call his girlfriend, walk around and have a cigarette (as observed on the dashcam) and thus, was not in custody. The Court agreed that from what could be seen on the video, Guinn was not in custody. The officer's order suggested it, but "other factors" suggested otherwise. As such, the Court agreed the Miranda was not required.

With respect to the test, the trial court had ruled that KRS 189A.103 allowed law enforcement discretion as to which test to administer. Guinn had admitted to having consumed a half/fifth of whiskey. By refusing to submit to a blood test, his refusal became admissible. The Court agreed that the holding in McNeely called into question the prior Kentucky case of Helton v. Com.[36], but the court found the error in the test to be harmless, as his statement that he'd consumed the whiskey was admissible.

The denial of his motions to suppress were affirmed.

[36] 299 S.W.3d 555 (Ky. 2009).

Mays v. Com., 2014 WL 1155429 (Ky. App. 2014)

FACTS: Between Jan. 1, 2009 and June 30, 2010, it was alleged that Mays sexually abused his step-granddaughter for whom he served as a babysitter. (He had been married to the child's grandmother, Debra, for some eight years at the time.) As a result, after talking to the child about the matter, Debra separated from Mays. She later testified to this, as did Sally, the victim.

Mays confessed to Det. Lawless (Louisville Metro PD), having set up the appointment and arriving on his own for it. He had been advised he was not in custody and in fact, was not arrested that day. He denied being able to have an erection, which was refuted by his wife's testimony. During the trial, Sally's mother was asked whether she'd talked about the "birds and bees" with her daughter, and whether she'd been allowed to view pornography. Her mother denied both.

Mays was convicted and appealed.

ISSUE: Do assurances that one's appearance at an appointment is voluntary mean it is not coercive?

HOLDING: Yes (see discussion)

DISCUSSION: Mays argued that he was in a coercive environment and as such, his confession wasn't voluntary. He conceded "that the detectives advised him that his appearance was completely voluntary, and that he was told he was free to leave when he wanted, he nevertheless assert[ed] that the detectives made him feel as if this was not the case." He complained the detective used the "Reid technique" – which the detective described as the method he used in all such suspect interviews – he started with building a rapport and then moved into a "more accusatory" technique. The Court agreed that the facts supported the ruling that he was not in custody at the time he confessed.

The Court affirmed Mays' convictions.

Huiett v. Com., 2014 WL 1268695 (Ky. App. 2014)

FACTS: In April, 2000, human skeletal remains were found in Boone County. The remains were found in a blue garment bag available at only one department store in the area. Eventually, the remains were identified as Stevens, who had gone missing the year before. The death was ruled a homicide by stabbing. Although parts of the body were missing, DNA provided the identification, but three brown hairs that did not match Stevens were also found.

Det. Kenner developed two separate theories as to what had occurred, with two separate suspects – either Stevens' boyfriend, Jansen, or Huiett and her boyfriend Day. Det. Kenner learned Jansen had recently abandoned his car, and that women's clothing was inside. He also found blood on the driver's side door jamb. Upon being questioned, Jansen denied any involvement and said that the blood was probably Stevens, but that "he was being set up." (The blood was confirmed not to belong to Stevens.)

Det. Kenner "told Jansen he had traced the garment bag containing Stevens' remains back to Jansen; in fact, he had not." (He only knew that "Jansen's mother may have owned that type of garment

bag in the past.") He replied that it was "probably the garment bag his mom had given him for Christmas."

During the investigation, Det. Kenner had discovered that Stevens was "having an affair with Day" and that Huiett may have committed the murder in a jealous rage. (She was very possessive of Day and had "threatened other romantic rivals." She was also known to carry a knife.) He learned that Day, Huiett and Stevens had all stayed at a local hotel around the time of the murder. Day and Huiett were evicted after a "loud disturbance," that included "Huiett screaming and making loud threats to kill Day." A coworker of Day repeated a threat that he'd heard Huiett make against Stevens. After they left, housekeeping discovered the room filthy and damaged and the bed had been made with sheets that did not belong to the hotel. They had also observed a large, possibly bloody, stain on the mattress, which they threw out, and a dark garment bag in the room. A "bevy of witnesses" stated they'd heard Huiett and Day admit the murder. Day had told a former girlfriend that they'd cut off Stevens' head and fingers – the skull and 9 fingers were missing from the corpse. That same witness indicated they'd used a dark blue bag and had tossed her in the river near Day's workplace.

Det. Kenner arrested Huiett and Day in 2002. None of the hairs matched either Huiett or Day. Both were charged and convicted in separate trials. Huiett appealed.

ISSUE: Does a failure to create documentation concerning an interview violate Brady[37]?

HOLDING: No (see discussion)

DISCUSSION: Among other issues, Hueitt claimed that the prosecution failed to disclose the existence of two witnesses interviewed by Det. Kenner. However, the Court noted that although he apparently spoke to both, he "failed to document his discussions with either." The court noted that "in order to be considered 'Brady material,' there must be actual 'material' for the prosecution to disclose." [38] The prosecution had disclosed his report as well as recordings of phone conversations in which he said he'd interviewed the pair – who were also listed by name in his case report. As such, the defense was on notice that the pair existed. Although Brady required the disclosure of exculpatory information, it didn't require that to be in a particular form.[39]

The Court agreed the material was properly disclosed but the case was reversed because of an unrelated issue related to DNA testing.

SUSPECT IDENTIFICATION

Wright v. Com., 2014 WL 1268695 (Ky. 2014)

FACTS: On February 19, 2011, a group of friends, Fowler, Coley, Benefield, Barnes and the Sprawls, were leaving a Covington bar at about 2:30 a.m. As they talked around the vehicle belonging to one of the group, Wright and Eaton approached. Wright produced a gun and

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[38] See Bell v. Bell, 512 F.3d 223 (6th Cir. 2008) (en banc) (quoting Todd v. Schomig, 283 F.3d 842 (7th Cir. 2002)).

[39] Weatherford v. Bursey, 429 U.S. 545 (1977).

demanded Fowler give him his property. Coley, thinking it was a joke, shoved Wright, who fired the weapon into the ground and stated, "this ain't no game." Shrapnel struck Beverly Sprawl in the leg. Fowler turned over a number of items, including his hat and glasses, and then ran away on foot.

Officers nearby heard the gunshot and approached. Officers Steffen and Griswold saw two men running and they refused to stop when commanded. Eaton discarded a handgun in a garbage can just before being caught by Officer Steffen. Officer Griswold saw Wright "throw an object which he assumed was a handgun onto the pavement as he fled." Wright was caught climbing into the backseat of an unlocked car. A search incident to his arrest "uncovered Fowler's property."

Both were convicted of Robbery, Assault 2nd and related charges. Wright appealed.

ISSUE: Is a showup lawful?

HOLDING: Yes

DISCUSSION: Less than an hour after the robbery, Fowler, Barnes and Coley were brought to a location and shown Wright and Eaton, both handcuffed. Wright was sitting in a cruiser and Eaton standing outside another one. All three separately identified the pair as the robbers and later testified at a suppression hearing on the matter. The Court agreed that "[a] single-person-showup [sic] identification is inherently suggestive, which requires the court to assess the totality of the circumstances surrounding the identification to consider the likelihood of an irreparable misidentification by the witness."[40]

Further, the Court looked to the Biggers[41] factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

The Court agreed that using those factors, the Court reviewed the testimony. The Court noted that there was no apparent evidence that the witnesses offered descriptions prior to the show-up, but each acknowledged what they had observed about the suspects, including distinctive tattoos and facial features. All expressed complete confidence in their identification and were quite attentive during the crime. (And certainly, the court agreed, since Wright was found in possession of Fowler's property, the identification was bolstered.)

Wright argued that the evidence did not support an Assault 2nd conviction. The proof indicated that Sprawl's injury was treated at the scene, with EMS using tweezers to remove shrapnel. She suffered some bleeding and a burning sensation, but required no further followup treatment. She did, however, suffer some minimal scarring, apparently. The Court agreed that her injury was not enough to be considered serious physical injury. Further, there was no proof that Wright intentionally caused a physical injury to Sprawl, either. The Court reversed the Assault 2nd conviction.

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[40] Rodriguez v. Com., 107 S.W.3d 215 (Ky. 2003) (citing Merriweather v. Com., 99 S.W.3d 448 (Ky. 2003))
[41] Neil v. Biggers, 409 U.S. 188 (1972)

The Court upheld the Robbery and other convictions, however.

Roeder v. Com., 2014 WL 689050 (Ky. App. 2014)

FACTS: On January 4, 2011, Roeder and Riggs were drinking at a Jefferson County tavern. Rice was also there and the three struck up a conversation. He accepted a ride and the ended up near "Dreamland Lake[42]" in south Louisville. There, Roeder and Riggs demanded money from Rice and punched him. They dragged him to a vacant lot and continued the assault, finally leaving with his wallet, shoes and leather coat. Emergency personnel responded and ultimately, he was admitted with broken facial bones and a brain hemorrhage.

Three weeks after the attack, Det. Crouch (LMPD) prepared two photo-pack lineups. Rice identified Riggs in the first, but selected a different person, and not Roeder, in the second. Thereafter, the detective obtained another photo, taken the night of the crime, and presented it in another photopack. Rice then identified Roeder. Det. Crouch arrested Roeder and Riggs. Riggs pled guilty and testified against Roeder, who was subsequently sentenced to Robbery 1st and Assault 1st. Roeder appealed.

ISSUE: May an in-court identification be made after a pre-trial identification is ruled inadmissible?

HOLDING: Yes

DISCUSSION: First, Roeder argued that the second presentation of a photo-pak was improper and unduly suggestive. At trial, the Court had ruled that the pre-trial identification was suppressed, but ruled that an in-court identification could be made and was, apparently. The Court noted that his failure to make the initial identification was not "determinative on the admissibility of the subsequent in-court identification." It can be raised in front of a jury to question the credibility of an in-court identification, however. In addition, other evidence was presented that corroborated the identification, most importantly, Riggs' testimony.

Roeder's conviction was affirmed.

B.L., A Child Under Eighteen v. Com., 2014 WL 702622 (Ky. App. 2014)

FACTS: On December 3, 2011, the Mecklins were sitting on a bench near a pedestrian bridge in Campbell County. A thief leaned over the fence, yelled at Mrs. Mecklin and grabbed her purse. Two officers responded within minutes, Officers Buemi and Dun, and ran onto the bridge. Within 5 minutes, that spotted B.L jogging and then walking across the bridge. He was behind a larger group of African American juveniles who were running across the bridge. Officer Buemi yelled, B.L. stopped but the remaining juveniles continued on. He "willingly talked to Officer Buemi and allowed a search. They found a B.B. gun but none of Mrs. Mecklin's property was found. Some was later recovered across the bridge, however.

[42] Properly, the area is actually known as Lake Dreamland.

B.L. was brought back in handcuffs and presented to Mrs. Mecklin, who identified him. He was charged with the theft. B.L. moved for suppression based upon an illegal stop and improper identification. Since B.L. appeared to be a willing participant in the stop, the Court overruled that motion. The trial court ruled the identification admissible and then found him guilty of theft. He appealed to the Circuit Court which found the identification "reliable and admissible." B.L. further appealed.

ISSUE: May the failure to file a responsive brief cause the reversal of an otherwise valid identification?

HOLDING: Yes

DISCUSSION: B.L. continued to argue that the show-up was too suggestive. The court looked to Neil v. Biggers and noted, that "when looking to the totality of the circumstances:"

> … the relevant factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' [sic] degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.[43]

B.L argued that there was a substantial likelihood of misidentification given conflicting testimony as to what he was wearing, the brief opportunity by the witness to view the thief.

Unfortunately, the Court concluded, it had to resolve this issue by the Commonwealth's failure to file a response brief to B.L.'s claim. The Court reversed the conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

McAtee v. Com., 413 S.W.3d 608 (Ky. 2013)

FACTS: On July 9, 2009, Haskins was murdered in front of Beals's Louisville home. Beals was interviewed by Det. Trees (Louisville Metro PD) four days later and she related everything she'd seen. She identified the shooter as YG, who she knew from the neighborhood. Kilgore, Beals's neighbor, who had been with Beals at the time, was interviewed as well and also identified the person involved in the altercation as YG, although he did not witness the actual shooting. He identified McAtee as YG in a photopak.

McAtee was indicted for Murder and Tampering with Physical Evidence (for leaving the scene with the gun). At trial, both Beals and Kilgore claimed to have no memory of the events. Beals denied even having spoken to Det. Trees. Kilgore, at least, remembered Det. Trees, but recalled nothing of the interview or of having made the identification. Det. Trees was allowed to impeach both witnesses using the statements they'd provided to him, including a recording of Kilgore's interview.

McAtee was convicted and appealed.

[43] 409 U.S. at 199–200, 93 S.Ct. at 382. B.

ISSUE: May prior statements be introduced when the subject claims no memory of them?

HOLDING: Yes

DISCUSSION: With respect to the statements introduced by Det. Trees, under KRE 801A(a)(1), "a statement is inconsistent … whether the witness presently contradicts or denies the prior statement, or whether he claims to be unable to remember it."[44] Such "prior inconsistent statements may be introduced as an impeachment device and as substantive evidence."[45] The Court agreed that both statements qualified as "testimonial" pursuant to Crawford v. Washington[46] because there was no "ongoing emergency" and the "primary purposes of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Court stated the question is "whether despite his memory loss, an amnesic witness 'appears at trial' to the satisfaction of the Confrontation Clause."[47] It noted that the Confrontation Clause only guaranteed an *opportunity* for cross-examination. The Court agreed that Crawford did not overrule Owens, which held that a witness appears when they "willingly take the stand, answers questions in whatever manner …."[48] The Court agreed it was proper to allow Det. Trees to testify as to what Beals and Kilgore said to him.

The Court also addressed the tampering charge and noted there was no evidence that McAtee had done anything to deliberately conceal the gun by placing it in an unconventional location. (The Court noted that the police had only searched for the gun at the scene of the crime, some months later.) The Court agreed that under Mullins v. Com., simply leaving with a gun is not enough to trigger a Tampering charge.[49] The Court reversed that charge.

In addition, Dets. Willett and Lesher testified about their interrogation of McAtee. He had argued that since they admitted some of the recording of the questioning – the "rule of completeness"[50] required that the entire recorded statement (three hours) be played for the jury. However, the Court concluded that in this case, McAtee was trying to get his entire statement (in which he maintained his innocence) before the jury without being subjected to cross-examination. The Court ruled, however, that defense counsel was "quite successful in exposing police interrogation techniques for their confession-inducing qualities" even without the entire recording being provided to the jury.

On an unrelated note, during deliberations, the jury asked to review Kilgore's recorded statement and were provided with the DVD and a standard DVD player. However, the DVD player would not read the disc. At that point, the judge asked the prosecutor to "provide a 'clean' computer" to use. The prosecutor did so, and also notified defense counsel that the request had been made. The Court agreed this process was in error, but held it to be harmless, because sending back the DVD was "akin to sending a witness back to the jury room."[51] (An alternative proper way to do this

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[44] Brock v. Com., 947 S.W.2d 24 (Ky. 1997).
[45] Jett 436 S.W.2d
[46]
[47] McIntosh v. Com., (2008)
[48]
[49] 350 S.W.3d 434 (Ky. 2011).
[50] KRE 106
[51] See Berrier v. Bizer, 57 S.W.3d 271 (Ky. 2001).

would be to call all parties back to the courtroom and allow the jury to view it in that setting, instead.) The defendant's actual confession, however, is always admissible.[52]

The Court reversed the Tampering conviction but affirmed the Murder conviction.

TRIAL PROCEDURE / EVIDENCE – SELF-INCRIMINATION

McGaha v. Com., 414 S.W.3d 1 (Ky. 2013) (HELD OVER FOR FINALITY)

FACTS: McGaha and Cowan were neighbors in Adair County and engaged in a "series of disputes." Most recently, Cowan objected to a light on McGaha's storage building that "annoyed him." When police arrived in response to a complaint, "Cowan and his wife became belligerent" and were arrested. The next day, Cowan was out riding on his ATV when he encountered McGaha. McGaha "steered directly into [Cowan's] ATV without braking," knocking Cowan off the vehicle and causing a serious, likely fatal, injury. Moments later, McGaha then shot Cowan in the head with a shotgun.

McGaha was charged with Murder. He admitted he killed Cowan but claimed self-defense. He presented evidence "of Cowan's threats, harassment, and intimidation toward" McGaha and his family. He also testified that Cowan had pointed a gun at him on a previous occasion, that he knew Cowan had a gun with him on the ATV and that he pointed it at McGaha that day. McGaha claimed that he rammed the ATV because of that. Further, he stated that he demanded Cowan show his hands, as he lay on the ground, and that Cowan made verbal threats. He shot him in response to a perceived threat.

McGaha was convicted, and appealed.

ISSUE: Does being a Facebook friend require someone to be excluded from a jury?

HOLDING: No (but should be disclosed)

DISCUSSION: McGaha argued that one of the jurors failed to disclose that "she was a Facebook 'friend' of the victim's wife." The juror had admitted that she casually knew some of the Cowan family, but that they weren't close. No question was asked about "any social media relationship[s]." (The juror had 629 Facebook friends.) The Court agreed, however, that her disclosure was responsive to the question asked and was truthful. McGaha could have asked additional questions of the juror but chose not to do so.

The Court agreed that "it is now common knowledge that merely being friends on Facebook does not, per se, establish a close relationship from which bias or partiality on the part of a juror may reasonable be presumed."[53] Further, "[F]riendships' on Facebook and other similar social networking websites do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire."

The Court affirmed McGaha's conviction.

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[53] Sluss v. Com., 381 S.W.3d 215 (Ky. 2012).

TRIAL PROCEDURE / EVIDENCE – CHILD WITNESS

Jackson v. Com., 2014 WL 702203 (Ky. 2014)

FACTS: Jackson was indicted of Rape/Sodomy 1st and related charges in Bell County. His victim was a 7 year old girl, Kelly, the daughter of his ex-girlfriend, which whom he'd lived for three years. Over the course of several interviews, Kelly described the assaults, with words, drawings and dolls to depict the attacks. A physical exam (taken 18 months after the assaults) was inconclusive.

Kelly was examined in an "in-chambers competency hearing" regarding her ability to testify, and was permitted to then testify at trial. Jackson was convicted of most of the charges and appealed.

ISSUE: May a child witness testify?

HOLDING: Yes

DISCUSSION: Jackson argued that in addition to describing the alleged abuse, Kelly had told social workers about a number of other matters that were arguably untrue. As such, he argued that her testimony was unreliable and "so incredible" that it required corroboration, which was not provided. The Court agreed that "corroboration in a child sexual abuse case is required only if the unsupported testimony of the victim is 'contradictory, or incredible, or inherently improbable.'"[54] Otherwise, decisions on credibility of a witness were left to the jury, as it normally the case in testimony. The Court noted that apparent discrepancies in her testimony must be weighed in the context of her age and experience and that she admitted some of the things she discussed were reasonable because of that – such as her inability to describe – using the proper term – ejaculation. The competency hearing, done when she was 9 years old, was sufficient under KRE 601, which presumes competency unless the witness is proved to be incompetent. Defense counsel declined to question Kelly, but was provided the opportunity to do so.

The Court upheld Jackson's convictions.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Jones v. Com., 2014 WL 702286 (Ky. 2014)

FACTS: Mitchell was asleep in her bed, in Jessamine County, when she awoke to the sound of four masked individuals in her room. They brandished a gun and a hammer, threatened Mitchell and her dog if she did not cooperate and demanded her valuables. They also told her she was being watched and would be killed if she called the police. They fled with a number of items. About two weeks later, Jones, Penn and Sheeley were caught breaking into another home. Penn and Sheeley admitted involvement in the Mitchell robbery and named Jones and Fain as accomplices. Ultimately Jones and Fain were tried together and convicted. Jones appealed.

[54] Garrett v. Com. , 48 S.W.3d (Ky. 2001).

ISSUE: Is evidence of a drug habit potentially relevant (and thus admissible)?

HOLDING: Yes

DISCUSSION: Prior to trial, the prosecution gave notice (pursuant to KRE 404(c)) of its intention to introduce evidence of Jones's involvement in illegal drug use, in order to show "motive, opportunity, intent, etc." It argued that it was necessary to show that the four knew each other, due to mutual drug use,, specifically methamphetamine, and that part of the motive was to get money to buy more drugs. Further, it gave notice that it intended to introduce testimony about Fain's appearance and that it was consistent with a methamphetamine user. Jones argued that the jury was "unduly inundated with prejudicial drug evidence." The Court, however, noted that "evidence of a drug habit, along with evidence of insufficient funds to support that habit, is relevant to show a motive to commit a crime in order to gain money to buy drugs."[55] In this case, evidence that Jones was unemployed, had no vehicle, was essentially homeless and "yet regularly used methamphetamine" was admissible. As such, the evidence was relevant and admissible under the Bell test, "which evaluates the proposed evidence in terms of (1) relevance, (2) probativeness, and (3) prejudicial effect."[56]

Jones's convictions were affirmed.

Grider v. Com., 2014 WL 891278 (Ky. App. 2014)

FACTS: Grider stood trial in Adair County on charges of trafficking in both the first and third degrees. Grider, a pharmacist, was charged following an investigation by KSP, working with the Kentucky Board of Pharmacy, and with the assistance of Chief Irvin (Russell Springs PD). They used Wilson as a CI to make a controlled buy in 2004 of methadone, using a video recorder to capture the sale, but the seller was not actually visible on the recording – although Wilson later testified it was Grider. Another officer had tailed Grider before the buy but lost sight of him; he did testify that Grider was dressed as the subject (seen from the neck down) on the video when he lost him. However, in a contemporaneous report, he reported that he was wearing something different.

At trial, in response to a question, Chief Irvin stated that Wilson had worked as a CI in other cases involving Grider in Russell County, even though previously, the Court had stated that the pending charges in those case were inadmissible. The Court also allowed a video deposition for an unrelated federal drug case as well.

Grider was convicted and appealed.

ISSUE: Is it improper to reference other criminal investigations involving the defendant?

HOLDING: Yes

[55] Adkins v. Com., 96 S.W.3d 779 (Ky. 2003).
[56] Bell v. Com., 875 S.W.882 (Ky. 1994).

DISCUSSION: The Court noted that following the Chief's testimony "referencing other criminal investigations involving Grider," the trial court properly admonished the jury. Mistrial, thus, was not appropriate, as it is legally presumed that the jury is capable of following such admonitions unless "a harmful event is of such magnitude that a litigant would be denied a fair and impartial trial and the prejudicial effect could be removed in no other way."

The Court upheld the admission of the video, as well, and upheld Grider's conviction.

TRIAL PROCEDURE / EVIDENCE – PHOTOGRAPHIC EVIDENCE

Dunlap v. Com., Ky. 2014 (modified from earlier ruling)

FACTS: Dunlap pled guilty to the rape of Kristy Frensley, he also murdered her son, Ethan (age 5) and daughters, Kayla and Kortney, with multiple stab wounds. Kristy Frensley was able to escape the fire set to destroy the bodies, although she was seriously injured. He went to a jury solely on the issue of the penalty, and the jury returned the death penalty. Dunlap appealed.

ISSUE: May gruesome photos be admissible?

HOLDING: Yes

DISCUSSION: Dunlap argued first that it was improper to admit the photos as proof of the conditions of the bodies, to satisfy an aggravating circumstances. The jury was asked whether Dunlap's "act or acts of killing were *intentional* and resulted in multiple deaths." In this case, the photos "helped illustrate the circumstances surround the crimes," and the prosecution has the right to prove its case even if the defendant pled guilty, as Dunlap did. Dunlap was "not entitled to erase the ugly parts of the picture and substitute words in their place." Even though the photos were gruesome, they were not excludable, because the decomposition shown "was directly attributable to the commission of a crime" – arson.

Dunlap argued that he was improperly interrogated. The Court noted that law enforcement arrived three days after the crime, with a search warrant. The only question asked at the home was when he was asked if he knew why the officers were there, to which he replied "About the Roaring Springs thing" – a reference to where the crime occurred. Although he was not under arrest at the time, the detective conceded that Dunlap had been detained and was not free to leave, and as such, he was "in custody." When he was brought to the Christian County Sheriff's Office, he was given Miranda and waived his rights, in writing. He denied any involvement in the crime. Although the Court agreed that it was an improper interrogation, the Court also agreed that his guilty plea did not bar him from challenging the "penalty phase admissibility of a statement allegedly procured in violation of Miranda." The Court further agreed that the question was an interrogation, in that it was likely to elicit an incriminating response, and it was properly suppressed by the trial court. However, the Court also agreed that his later statements were not "tainted," and was not coerced nor was there any indication he was impaired in any way. As such, the trial court property did not suppress the later statements made at the Sheriff's Office.

Finally, the Court agreed that showing portions of his recorded interview at the Sheriff's Office was proper, to counter his assertion that he was mentally ill at the time. The Court agreed it was proper to present the information to the jury.

The Court upheld Dunlap's plea and sentence.

Mitchell v. Com., 423 S.W.3d 152 (Ky. 2014)

FACTS: In September, 2010, a man approached Hughes as he entered his Louisville apartment. He forced him inside at knifepoint, bound him and stole items from the apartment. Less than a month later, Staples apartment was burglarized in another part of town, and finally, in October, Gibson was also robbed at knifepoint in the same area where Hughes lived. In that robbery, the victim's truck was taken.

Two days later, Officers Masterson and Hirtzel (Louisville Metro PD) noticed a truck carelessly parked near an apartment building and a man carrying an item to the truck. Believing the man to be connected to a burglary in another apartment, they approached and he fled into a nearby apartment. With the occupant's permission, the searched, finding Mitchell hiding. They also found a distinctive sweater and a knife that did not belong to the occupant. The truck was found to belong to Gibson.

Mitchell was ultimately indicted for Robbery, Burglary and Unlawful Imprisonment against various victims. He was convicted of most charges and appealed.

ISSUE: May photos be admitted if they are misleading?

HOLDING: No

DISCUSSION: Mitchell argued that "photographs depicting a pickup truck with a sweater hanging from its open door and [Mitchell] wearing the same sweater" with admitted in error. The sweater was critical because both officers testified that the man they spotted was wearing that sweater. Officer Hirtzel, however, agreed that the "sweater was not found on the pickup truck." Mitchell argued the photo was staged to create an inference and the Court agreed. The Court looked to KRE 901(a) and agreed that while the photos "may be technically accurate," they portrayed the scene in a misleading way.

Since the case was already being reversed on unrelated procedural reasons, the Court ruled that the photos could not be used in a subsequent retrial. However, in addition, the Court ruled that the trial court's refusal to apply the "kidnapping exemption" in KRS 509.050 was proper and allowed the Unlawful Imprisonment charges to be available to the jury.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Yates v. Com.,

FACTS: Sally, age 14, was dating an 18 year old, Austin. She lived with her mother, her two brothers and Yates, her stepfather. In November, 2010, she went to a local park with friends and met up with Austin. At some point, Yates learned about Austin and several nights later, he

confronted her. (Sally's mother often worked evenings and was apparently not home.) Yates told her that her mother would not approve and that Austin would go to jail and would be "hurt" by other inmates. However, he told her that if she would "do something sexual" with him, he would not tell her mother. Several hours passed and she thought about it. Out of fear for Austin, she finally agreed. She had refused sexual advances from Yates in the past, but this time, "she felt forced" to have sex to protect Austin.

That night, she entered his room in the middle of the night. Sexual touching culminated in sexual intercourse. She told her mother and a friend, but her mother did not believe her. (The friend apparently did.) She moved out for a time, but returned, and she and Yates began to argue. In July, 2011, she asked a friend of her mother if she could stay with her when Sally's mother was working. The friend asked why and Sally explained. She encouraged Sally to report the assault and she did so.

Fulton County law enforcement officers took a statement and obtained a search warrant. A search uncovered corroborating evidence, as well as several computers.

Yates was indicted on Rape 1st, Sexual Abuse 1st, Unlawful Transaction and PFO 2nd. He was convicted and appealed.

ISSUE: Does a threat constitute physical force if it is not something that would be done by the perpetrator?

HOLDING: No

DISCUSSION: First, Yates argued that the element of "forcible compulsion" was not proven. He argued that at most, he implied that the boyfriend might be harmed, not that he threatened any direct harm to anyone. The Court parsed the term at length and agreed that "the sexual intercourse must be the result of an act or threat of physical force *done by the defendant*." Not all touching, however, is enough to constitute physical force. A victim's "voluntary acquiescence 'negates the element of forcible compulsion,'" even if the victim is too young to "consent in the statutory context." In the facts at bar, the Court agreed that he did not use physical force against Sally. Certainly, Rape 3d may have been appropriate and possibly Unlawful Transaction, but Rape 1st was not an appropriate charge as he did not use physical force against her. With respect to a threat of physical force, the Court agreed that any threat was "insufficiently immediate" to satisfy Rape 1st as well, and that it was "too attenuated" from the time of the sex act.

Unfortunately, at trial, the jury was not instructed on Rape 3d, and as such, he could not be retried for it. He could, possibly, be tried for another offense (the Court offered up "sexual blackmail" as a possibility).

Yates also argued that it was improper to reveal his computer password, which was, in fact incriminating. He offered to remove the password protection from the computers, before they were removed, but the officers refused. Instead, they asked for the password. He did not want to say the password in front of his wife, so he wrote it down. The password involved a sexual comment relating to his stepdaughter, which he argued was prejudicial. The Court, however, agreed it "was relevant and had an extremely high probative value." The information indicated that had "incident of sexual intercourse" between the two was likely.

Finally, the Court agreed that it was proper to deny Yates the opportunity to ask Sally about a prior inconsistent statement "she allegedly made to a care provider at a counseling center." Initially, the records were refused, but finally, based on other evidence, the Court reviewed the records *in camera*. Some were then provided to the defense and indicated she'd denied any sexual acts with Yates. The Court ruled that the statements were privileged under KRE 506 and could only be admitted if Sally "opened the door" to them. Since she did not do so, in her testimony, the information was not presented to the jury. The Court agreed that it was unclear whether a privilege applied, as it was unclear from the record to whom the statement was made and what that individual's position was.

Yates argued that statements were admissible under KRE 801A(a)(1), the "Jett Doctrine." "That rule has four requirements: (1) a testifying witness who made out-of-court statements; (2) an inconsistency between the witness's testimony at trial and the out-of-court statements; (3) a foundation that complies with requirements of KRE 613; and (4) an examination concerning the statements." The Court agreed the information was inconsistent with her trial testimony but noted this was a situation where there were "two 'layers' of hearsay" in the records and there was no attempt to actually authenticate the records and there was no evidence they were "self-certifying." However, the Court agreed the records would have only been required if Sally had denied making the "exculpatory statement to a therapist." The Court agreed it was error to deny Yates the opportunity to question her about the statements she made while in treatment.

The Court reversed the convictions for Rape and Sexual Abuse and remanded the case.

TRIAL PROCEDURE / EVIDENCE –TESTIMONY

Rieder v. Com., 423 S.W.3d 152 (Ky. App. 2014)

FACTS: On April 17, 2011, at about 1 a.m., Rieder and Muzic were leaving a Lexington bar. Although they were not together, initially, Muzic solicited a ride home from Rieder. Rieder refused bus Muzic "got into the backseat" of Rieder's car and asked for a ride to a gas station nearby. Rieder initially refused but was talked into agreeing.

At the gas station, Muzic refused to get out. Rieder then pulled a firearm he had concealed. Muzic still refused, and finally, Rieder "physically removed him." Once outside the car, Rieder later claimed, Muzic attacked him. Eventually he pulled the weapon and pointed it, and it went off, killing Muzic. Rieder claimed it went off accidentally, but he was charged with murder.

ISSUE: Is a lay witness allowed to give an opinion upon the legality of an act?

HOLDING: No

DISCUSSION: At trial, Sgt. Richardson testified that it was his opinion that Rieder did not have the right to shoot Muzic at that time. The testimony did not draw an objection at that time, however. The Court looked to Ordway v. Com., in which the Court agreed that the prosecutor elicited impermissible testimony from a witness.[57] In this case, the question as to whether Rieder shot Muzic in self-defense was for the jury, not for a witness.

[57] 391 S.W.3d 762 (Ky. 2013).

Rieder also argued that he should not have been prosecuted under KRS 503, but the Court noted, his defense was, in fact, that the gun went off accidentally, not that he deliberately fired it to protect himself. Since both were outside the vehicle at the time, he could not use the "occupied vehicle argument."

The Court vacated Rieder's conviction and remanded the case

Stowers v. Com., 2014 WL 702180 (Ky. 2014)

FACTS: Stowers married Webster in June, 2009, and lived with her and her two teenage daughter for most of that year. On September 9, Diane, age 13, went to the hospital complaining of bleeding from a heavy period and pain, instead, she was found to be suffering from a miscarriage. A nurse, Mellon, spoke with her, and Diane stated that Stowers had raped her. Later testing confirmed that Stowers was the father of the unborn child.

Stowers was indicated on two counts of Rape 1st. He was convicted and appealed.

ISSUE: May a medical professional give an opinion in court on a non-medical issue?

HOLDING: No

DISCUSSION: Stowers admitted he'd engaged in sexual intercourse with Diane, but denied that he used force. He argued that "Diane failed to articulate any specific threat made against her or her family." She did, however, testified that she was scared and "did not know what to do" when attacked, and that on both occasions, she told him to stop. The Court agreed that the test would be subjective and that it was clear that the sexual contact was unwelcome. In both cases, she fled to her sister's room after the rape. Stowers argued that her fear was of her father and mother's reaction, if they found out, based on a statement she'd made to an investigator. The Court, however, noted that might explain the delay in reporting, but did not contradict her trial testimony.

Stowers also argued it was improper for the nurse to testify that she believed the sex was non consensual and that it constituted inadmissible bolstering. The nurse had questioned Diane about the situation, at the request of the doctor, and asked her about a boyfriend. As a result, she'd concluded that Diane had not had sex with her boyfriend. The Court agreed that "a witness may not vouch for the truthfulness of another witness."[58] The court noted that in this case, the nurse was not stating her belief that Stowers raped Diane, only that she did not believe that her pregnancy was the result of a consensual act with her boyfriend. Diane did not reveal the rape until further questioned whether anyone had done something to her that they should not have. The Court agreed that the initial statement "did not relate directly to Stowers" and thus did not affect his rights.

The Court upheld Stowers' convictions.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

Minter v. Com., 415 S.W.3d 614 (Ky. 2013) (HELD OVER FOR FINALITY)

[58] Stringer v. Com., 956 S.W.2d 883 (Ky. 1997).

FACTS: Minter attended a party at a Madison County apartment. Griffin and his girlfriend, Beth, also attended. They all became intoxicated. Beth asked Minter to help her get Griffin back to their next door apartment. Beth then returned to the party. Griffin later testified that Minter sodomized him. Afterwards, Griffin called police and went to the hospital, where a rape kit was performed. The results were a positive match for Minter.

Minter was indicted 17 months later for Sodomy, Burglary and Assault, and just prior to trial, the charge of PFO was added. At trial, Minter argued that the sexual encounter was consensual. Minter was convicted and appealed.

ISSUE: Does the Rape Shield law prevent introduction of most prior sexual conduct by the victim?

HOLDING: Yes

DISCUSSION: First, Minter argued that the burglary conviction was invalid, because it failed to establish that he had the intent to commit a crime necessary for the charge. The court disagreed, ruling that even if he was permitted in by Beth, that it was proper for the jury to credit Griffin's testimony that he told Minter to leave. In addition, Minter had argued that he was kept from presenting a complete defense, by showing that Griffin "had on other occasions engaged in homosexual activity." He attempted to do so using another witness testifying as to what Beth had told the witness, that she had caught Griffin in sexual acts with men. The Court agreed that to admit the testimony was generally prohibited under KRE 412, the "Rape Shield Law." Although there are exceptions, none applied in this case. The Court agreed that evidence that would indicate "prior sexual behaviors that have no relevance to the offense on trial except to case a negative light upon the alleged victim" was generally inadmissible. Whether he had, or not, engaged in prior consensual homosexual activity was not a factor in the case. The Court agreed that KRE 412 was properly applied.

Minter's convictions were upheld.

TRIAL PROCEDURE / EVIDENCE – INVESTIGATIVE HEARSAY

McDaniel v. Com., 415 S.W.3d 643 (Ky. 2013) (HELD OVER FOR FINALITY)

FACTS: On the night in question, McDaniel was accused of shooting Washington and Henderson. He was charged with Assault 1st for both victims. During the trial, two witnesses testified in explanation of prior inconsistent statements made by one, Washington, in the context of viewing a photo array. During that process, Washington was equivocal in his identification of McDaniel as the shooter, in contrast to his "more assured" identification at trial. Det. Warner also testified as to the circumstances of the identification and that he believed the Washington feared retaliation for making identification. He was convicted and appealed.

ISSUE: Is "investigative hearsay" admissible?

HOLDING: No (but see discussion)

DISCUSSION: McDaniel argued that he was entitled to a limiting instruction to the jury, cautioning them to use the testimony of the two witnesses only for the purpose of the explanation of the prior inconsistent statement. He also argued that Warner's comments, in which he also discussed Washington's fear, was inadmissible investigative hearsay.

> The Court noted that "investigative hearsay" is a "misnomer . . . derived from an attempt to create a hearsay exception permitting *law enforcement officers* to testify to the results of their investigations."[59] The Court had rejected the concept in a line of cases started with Sanborn v. Com.[60] The Court noted that it applies under the "verbal acts doctrine," which provides that testimony is nonhearsay when it is "not admitted for the purpose of proving the truth of what was said, but for the purpose of describing the relevant details of what took place." The Court, however, admitted Warner's description under the "hearsay exception for then-existing state of mind (Washington's fear).[61]

The Court did, however, find "especially troubling" Warner's statement that he knew Washington "was pretty sure he knew who the person was." Although not specifically vouching, or "bolstering," Washington's identification, it was "still improper because he gave lay opinion testimony as to what another witness meant by what he said out of court."[62] However, the Court did not find it so erroneous as to warrant reversal, as Washington's fear of retaliation appeared more general in nature, and not directed specifically toward McDaniel.

McDaniel argued, as well, that he was improperly charged with respect to the injuries Henderson sustained – a through and through gunshot wound to the wrist. No medical testimony was presented but the injury was apparently treated in the emergency room and she was sent home, and she told others that the pain lasted only a few days. She testified at trial that she did not lose the use of her hand for any length of time, although she did use a "stress ball" to get her strength back. The Court agreed that the injury did not appear, from the evidence presented, to be a "serious physical injury" nor did she suffer a serious and prolonged disfigurement or prolonged impairment of health – she ended up with only a small scar. As such, Assault 1st was not appropriate and that conviction was reversed.

TRIAL PROCEDURE / EVIDENCE – IDENTIFICATION AT TRIAL

Morgan v. Com., 421 S.W.3d 388 (Ky. 2014)

FACTS: On December 3, 2011, Rudolph arrived at her workplace, a convenience store in McCracken County. She unlocked the door and then relocked it behind her, entering her security code. She took the trash out, again, locking the door. Returning to the store, she was confronted by Morgan, who demanded money at knifepoint. She unlocked the door and they both entered. Morgan took over $700 in cash and coins and then fled.

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[59] Nall v. Com., No. 2007-SC-000189-MR (Ky. 2008).
[60] 754 S.W.2d 534 (Ky. 1998).
[61] KRE 803(3).
[62] Tamme v. Com. 973 S.W.2d 13 (Ky. 1988); *see also* Thacker v. Com. , No. 2004-SC-000517-MR, 2005 WL 2675001 (Ky. 2005)

The investigator secured the surveillance video and obtained still photos. He located the suspect vehicle at the home of Morgan's friends, Purefoy and French. Purefoy stated he'd loaned the car that day to his sister, Tiffany, who was Morgan's girlfriend at the time. Morgan was subsequently charged and convicted of Robbery 1st. Morgan appealed.

ISSUE: Is is proper to allow an identification of video/still shots, when the suspect's appearance has changed?

HOLDING: Yes

DISCUSSION: Morgan argued that allowing Purefoy, French and another individual, Miller-Smith, to identify Morgan in the video and still shots was improper. The Court agreed that it was necessary to have the witnesses testify because Morgan had "since changed his facial hair." The Court noted, however, that in fact, it may have helped his case, because all three expressed some uncertainty in their identification.

Morgan further argued that the testimony was opinion, and "based on nothing more than the same evidence presented to the jury – the surveillance video and still photos." The Court disagreed, finding instead that their "testimony was rationally based on the witnesses' personal knowledge from prior exposure to Morgan's physical appearance."

The Court upheld his conviction.

CIVIL LITIGATION

McKinney v. City of Paducah, 2014 WL 631700 (Ky. App. 2014)

FACTS: In November, 2009, the Hopkins County Sheriff's Office told the Paducah PD that Dustin McKinney (the adoptive son of Donnie and Marcia McKinney) was a suspect in a double homicide and firearms ("two assault rifles and two shotguns") theft. Paducah's investigation led them to the McKinney's home, which was also listed as his home in his vehicle and OL records. Paducah PD obtained a search warrant for the home and his vehicles.

On November 19, it was decided that the city's SWAT team would be involved, due to the nature of the crime and the possibility of the weapons. First arriving team members observed the house for some time but did not see Dustin's truck. As they prepared to execute the warrant and got closer to the home, they could see an unidentified man lying on the couch in the living room. SWAT did a "knock and announce" at the front door.

From this point, the "exact sequence and timing" was debated. It was agreed that the officers knocked and identified themselves. However, the McKinney's argued that as Donnie approached to answer the door, the team "took rapid action, including breaching the door and deploying a 'flash bang' to distract and disorient" him. Paducah, however, contended that Donnie approached the door, but did not answer it for some seconds, and that the identified themselves three times before breaching.

Upon entry, the team encountered Donnie in a narrow foyer. Donnie said he could not hear their commands as he was deafened by the loud explosion. He blocked their entry and protested, and one of the team "administered a 'sternum tap,'" striking him in the chest with a rifle barrel and doubling him over. He was put on the ground and allegedly held down with a knee to the back. The officers encountered Marcia and ordered to the floor, "she expressed difficulty in complying due to mobility problems." They "assisted her to the ground." They were not handcuffed but kept on the floor as the officers searched, unsuccessfully, for Dustin and the weapons. Marcia suffered no injury, but Donnie had at least one rib broken by the blow to the chest. Following the search, Paducah triangulated Dustin's cell phone and he was arrested the next day in Hopkins County.

The McKinney's filed suit in both state and federal court. During the federal discovery, an expert was deposed who criticized the use of the sternum tap and some of the other measures, including a lack of intelligence gathering prior to entry. The federal court granted summary judgment to Paducah on the Constitutional claims but declined jurisdiction over the state claims. In the state claims, the McKinneys argued at that Kentucky Constitution was violated and that Paducah PD committed negligence, assault and battery. Following discovery, the trial court ruled in favor of Paducah on all counts. The McKinneys appealed.

ISSUE: Must experts be given equal credence by the court?

HOLDING: Yes

DISCUSSION: The Court of Appeals noted that the :"trial court's misplaced reliance" on the City's expert, effectively ignoring the McKinney's expert who disagreed with Paducah's "decision to enter the home and the force used to do so, including the physical treatment of" the McKinneys The Court looked to the points in which the two disagreed, including the use of the SWAT team during the warrant service and where the use of a "sternum tap" falls on the use of force continuum. (It was agreed that "officers are not required to attempt every level of the continuum before utilizing the force they believe is necessary.") The deposition testimony of the two experts "reveal two conflicting schools of thought offered by the experts in this case concerning the crucial question of excessive force." As such, a jury must be allowed to decide.

The Court concluded:

> It is not this Court's task or desire to take the lens of hindsight to the actions of PPD. It is not for us to endorse or condemn the use of a SWAT team and its tactics in pursuit of a dangerous individual. Whether the officers' decision to forcibly enter the home rose to the level of negligence, or even gross negligence, whether their actions met the elements of civil assault and civil battery; and whether the city was entitled to defenses on any or all of those counts are all genuine issues of material fact for a jury to decide.

The Court ruled that the state constitutional claims were barred, as they were already decided, in effect, by the federal decision. However, the Court reversed the ruling dismissing the state tort claims, and remanded the case for further action.

O'Connell (Jefferson County Attorney) v. Cowan (Jefferson Circuit Court Judge), 2014 WL 702309 (Ky. 2014)

FACTS: On March 2, 2005, Brightwell (a local attorney) was charged with Intimidating a Participant in a Legal Process, Harassing Communications and Terroristic Threatening; the allegations were that he'd sent "threatening messages to the victim of a criminal case through use of his Yahoo Instant Messaging account." Det. Scott (Jeffersontown PD) was the investigating officer and obtained a search warrant for Brightwell's computer and subsequently he was also charged with Tampering with Physical Evidence, with an allegation that he "had hidden or destroyed evidence of the purported messages. (Santry, an assistant county attorney, actually filed the charge.) A probable cause hearing was held and a forensic computer examiner "testified that there was no evidence that Brightwell tampered with his computer." That charge was dismissed and ultimately, he pled guilty to Harassing Communications.

Brightwell sued Det. Scott and Jeffersontown, claiming that the detective "made false statements to Santry in order to induce her to file the tampering with physical evidence charge despite there being no evidence to support it." In discovery, Det. Scott contested this and subpoenaed Santry and documents from the County Attorney. The County Attorney moved to quash it, arguing that the requested documents were privileged as litigation files. Sentry agreed to answer interrogatories, however. She denied knowing any specifics about the matter and withheld documents pursuant to Ky CR 26.02(3)(a) as "work product." The trial court, upon Brightwell's request, ruled that the documents were not privileged because Santry and the County Attorney were not part of the lawsuit against Scott. She was ordered to appear for a deposition and produce documents.

The County Attorney filed for a writ of prohibition, which was denied by the Court of Appeals. They further appealed to the Kentucky Supreme Court. The Supreme Court noted that it must make a distinction between "primarily factual, non-opinion work product, and opinion work product, also called 'core' work product, which includes the 'mental impressions, conclusions, opinions, or legal theories of an attorney.'"[63] The Court concluded that it was likely opinion work product that was in question and remanded the case for further consideration under the appropriate standard ("compelling need"). The trial court ordered the material to be provided to it, for review as ordered. The County Attorney further appealed and the case came back to the Kentucky Supreme Court.

ISSUE: Is it proper for a trial court to order that documents be provided to it, for review?

HOLDING: Yes

DISCUSSION: The Court looked to whether the trial court's order, to turn over the documents for review, was proper. The Court agreed that the trial court made the appropriate finding that it found reason to believe relevant evidence might be found upon review Further, the Court agreed there was no indication that following review, the trial court would turn over the document without giving the County Attorney the chance to object.

The court affirmed to denial of the writ of prohibition.

EMPLOYMENT

Beeler v. City of Hillview 2014 WL 689033 (Ky App. 2014)

[63] Morrow v. Brown, Todd and Heyburn, 957 S.W.2d 722 (Ky. 1997).

FACTS: Beeler was employed by the Hillview PD from 2007 until August, 2011. In July, 2011, he was suspended for four violations of the agency's SOP: failure to complete required training; failure to follow orders from his Major to call his Sergeant; improperly filling out two evidence cards; and recording a conversation with his supervisor, Chief Caple, in violation of a special order. After an August hearing, he was terminated by the Board. Beeler appealed his termination; it was affirmed by the Bullitt Circuit Court. He further appealed.

ISSUE: Must a police employee be given sufficient detailed notice of alleged claims?

HOLDING: Yes

DISCUSSION: First, Beeler argued that he was given "insufficient notice of the charges against him." He received a letter notifying him of the SOPs, but it did not detail his alleged conduct. The Circuit Court had agreed the notice was insufficient pursuant to KRS 15.520(1)(e). However, he did not raise that claim before the Board itself and the Court agreed that absent that, it could not be considered by an appellate court. Beeler alleged that the Board was biased against him, but provided no evidence that the Board relied in any way on "allegedly improper communications."

Finally, he argued that communication between a Board member and an official of the PD was improper and prejudicial, but the Court disagreed, finding that the communication did not taint the Board's finding. The Court noted that there was extensive evidence that proved Beeler did, in fact, commit the alleged acts.

Beeler's termination was upheld.

EMPLOYMENT – WHISTLEBLOWER

Ross v. University of Kentucky /Reed, 2014 WL 29001 (Ky. App. 2014)

FACTS: Ross, an internal auditor, was employed by UK and reported directly to Reed. At some point, Ross became concerned about the use of procurement cards (credit cards) used to make purchases. He made recommendations to improve the process but when nothing changed, he concluded his recommendations had been disregarded. During a separate audit, he recognized inconsistencies and problems with another matter. Ultimately, in February, 2007, Ross told Reed "that he did not think Reed was doing his job" and threatened to leave. Ross "threatened to take his concerns to Butler," to whom Reed reported. He changed his mind, and they agreed he would "transition" out of the Internal Audit department to another UK position. Instead, however, Ross later alleged, Reed began to retaliate against him. He began working from home and communicated irregularly with the office and with Reed. After Butler asked him for, in effect, a letter of resignation, in June, 2007, Ross spoke to Butler and then followed up with an e-mail, detailing his concerns. After that time, he was directed to return to the workplace.

By August, Ross did not have another job, so he sent out another e-mail to a number of UK's senior management staff and to the State Auditor's office. He was terminated on August 31 for insubordination.

Ross sued Reed and UK under KRS 61.102, the Kentucky Whistleblower Act, alleging wrongful termination and intentional infliction of emotional distress. UK and Reed received summary judgment and Ross appealed.

ISSUE: Does a claim under the Whistleblower Act require that the individual make a good faith attempt to report to an appropriate body?

HOLDING: Yes

DISCUSSION: The Court looked to the purpose of the Whistleblower Act and noted it was to "protect employees who possess knowledge of wrongdoing that is concealed or not publicly known, and who step forward to help uncover and disclose that information." Four elements must be met to satisfy a claim under the Act: the employer must be of the state, the employee must be employed at the time, they attempted to make a good faith reporting to an appropriate body or authority, and the "employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure." The employer is then able to introduce evidence that the action wasn't a contributing factor in the termination, with the standard being "to prove by clear and convincing evidence."

Ultimately, the Court decided that question of whether Ross made a good faith attempt to make the report was close, and should have been resolved by a jury, not summary judgment. The Court agreed that internal disclosure (to Butler) was permitted, rather than requiring the report be made to an external entity. The Court agreed that Reed, as an individual, however, was not a party and was properly dismissed.

The Court reversed the summary judgment and remanded the case.

OPEN RECORDS

Kentucky New Era v. City of Hopkinsville, 415 S.W. 3d 76 (Ky. 2013) (HELD OVER FOR FINALITY)

FACTS: A writer for the Kentucky New Era, Inc. requested copies of arrest citations and police incident reports for a 7 month period in 2009, involving stalking harassment or terroristic threatening, from the Hopkinsville PD. The City Clerk "withheld some records, including those involving juveniles and open cases, and redacted personal data from other reports, including not only names in some instances, the social security numbers, driver's license numbers, telephone numbers, and complete home addresses of victims, witnesses, and suspects." Eventually, the New Era received redacted copies of all of the requested records. The New Era noted that it was trying to analyze differences in how Hopkinsville police "treated stalking, harassment, and terroristic threatening complaints" and … why the police 'made arrests and pursued charges in some situations but not in others.'" In its redactions of the records that were released, the City also removed "such demographic data as birth date, marital status, gender, race and ethnicity." In its initial appeal to the withholdings and redactions, the Attorney General agreed "that an entire record was not rendered exempt merely because it mentioned, in some capacity, a juvenile, and he also agreed with the newspaper that the City's privacy redactions did not comport with the Act's requirement that exemptions be applied narrowly." The City initiated an action in the Christian Circuit Court, which

held that the redactions of social security and driver's license numbers, home addresses and telephone numbers was proper, but that wholesale redaction of demographic data was not. (That ruling was not appealed by the City.) Further, it ruled that information on juveniles was not totally exempt under KRS 610.320, which called of the "nondisclosure of a juvenile's court records."

Both sides appealed, and the Kentucky Court of Appeals upheld the City's redactions of personal identification data. It also ruled that under the "privacy exemption the names of juveniles, as well as any other information individually identifying them, could be redacted from the requested records." New Era then sought discretionary review, arguing that in upholding the redactions, the Kentucky Court of Appeals misapplied the Open Records Act, in particularly the redaction of information which "would constitute a clearly unwarranted invasion of personal privacy" under KRS 61.878(1)(1).

ISSUE: May most personal information be redacted from law enforcement records produced in an Open Records request?

HOLDING: Yes

DISCUSSION: The Court noted that the current Open Records Act (ORA) excludes 14 types of records from disclosure. To preserve the ORA's "presumption in favor of open examination," the Court agreed that it must be strictly construed and that the agency seeking exemption must detail "by affidavit or otherwise, the record or information withheld, the exemption or exemptions claimed, and the reasons why the withheld information falls within the claimed exemption." The Court agreed that it "must balance the interest in personal privacy the General Assembly meant to protect, on the one hand, against, on the other, the public interest in disclosure."

The Court agreed that an individual has a strong interest in "controlling the dissemination of personal information" – especially when it is compelled by the government to disclose that information initially and then "turns around and disseminates that information to a third party." The Court agreed that an "individual's interest becomes strong with regard to personal information the dissemination of which could subject him or her to adverse repercussions" that could "include embarrassment, stigma, reprisal, all the way to threats of physical harm."[64] Further, the Court noted that "as a categorical manner … a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy."[65] In National Archives and Records Administration v. Favish,[66] the Court agreed that private citizens might appear in law enforcement records as the "result of mere happenstance," as a witness, etc. and as such, the "privacy interest … is at its apex." As such, federal courts and the FOIA have generally held that such information is "generally exempt from disclosure" unless critical to "confirm or refute substantial evidence that the agency is engaged in improper conduct or is necessary otherwise to reveal 'matters of substantive law enforcement policy.'"[67]

The Court ruled, that it had "no hesitation in recognizing as the federal courts have, that, absent a statute to the contrary, Kentucky's private citizens retain a more than de minimis interest in the

[64] Dept. of State v. Ray, 502 U.S. 164 (1991).
[65] U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).
[66] 541 U.S. 157 (2004).
[67] American Civil Liberties Union v. U.S. Dept. of Justice, 655 F.3d 1 (D.C. Cir. 2011).

confidentiality of the personally identifiable information collect from them by the state." The Court agreed that "witnesses, victims, and uncharged suspects referred to in the … arrest and incident reports, adults and juveniles alike, have privacy interests in their addresses, phone numbers, social security numbers, and driver's license that implicates KRS 61.878(1)(a) of the ORA." The Court also noted that juveniles have long had privacy protections as perpetrators, and found "no rational basis for recognizing that heightened privacy interest for a juvenile perpetrator but denying it to juvenile victims and witnesses, particularly in the context of records pertaining to stalking, harassment, or terroristic threatening, all typically intensely personal crimes." Turning to the public interest in such disclosure, the Court agreed that disclosure is not warranted when it "would not serve the public interest and was not required merely 'to satisfy the public's curiosity.'"

As it stands, the newspaper would be entitled to the names of those involved except in the case of juveniles, for their stated purpose of "monitoring" the Hopkinsville police department's "performance of its investigatory and law enforcement duties." Although the Court agreed that the public is entitled to know that the PD is "providing equal protection to all parts of the community," it did not agree "that interest can only be vindicated by sacrificing the privacy interests of all those with whom the police come in contact." Home addresses, for example, often have no relation to an incident, and even when it does, a street name may be sufficient to "show where in the city the police have, or have not, been active." With the names, the newspaper could follow up by routine methods to find the individuals. The newspapers speculation that some of these individual "might be able to shed light on police misconduct" is not enough to override the privacy exemption. The Court agreed the redactions were proper.

Further, the Court agreed, the City's "categorical" redaction, not a blanket denial, is appropriate, and that the agency "need not undertake an ad hock analysis of the exemption's application to such information in each instance, but may apply a categorical rule."

The Court summed up:

> The Open Records Act is meant to open the state's public agencies to meaningful public oversight, to enable Kentuckians to know 'what their government is up to.'" It is not meant to turn the state's agencies into clearing houses of personal information about private citizens readily available to anyone upon request."

The Court agreed that the redactions were proper and upheld the decision of the Kentucky Court of Appeals.

Fiorella v. Paxton Media Group LLC (Owensboro Messenger-Inquirer), 424 S.W.3d 433 (Ky. App. 2014).

FACTS: Fiorella (and others) was involved in a lawsuit as an employee of the Kentucky Community and Technical College System (KCTCS). She allegedly made defamatory statements against another employee of the Owensboro institution, which resulted in that individual being reassigned. She was deposed during discovery and was concerned that some of the testimony would paint her in a bad light, with no opportunity to refute. Portions were supposedly sealed "by agreement" between the parties, but there was no formal request for the trial court to actually seal the document. However, the Owensboro Messenger-Inquirer was denied access to the material and filed a lawsuit to force the release of the materials. In the interim, however, the underlying lawsuit

involved Fiorella was dispensed with allegedly by agreed order, but the court records indicated the dismissal was on rule grounds.

Despite that fact, the trial court ruled that the matter was not moot and that the records should made public, since "public funds had been expended in settling the case." Fiorella appealed.

ISSUE: Does the press have a right to discovery material?

HOLDING: Not necessarily

DISCUSSION: The Court noted that both parties focused on the "right of access by press and public to court records." However, looking to the rules of procedure, the Court looked at CR 26.03(1) – which permits the sealing of records for good cause. Absent good cause, however, the records do not receive judicial protection. The Court agreed, however, that discovery is "essentially a private process" – even when the documents are in the custody of the court. In Courier-Journal, Inc. v. McDonald-Burkman, the Court had agreed there "was no constitutional right of access to discovery material" to the press.[68] However, unlike that case, Fiorella never formally invoked the civil rule, to seal the material.

Using a sliding scale, balancing the interest of the public with the interests of Fiorella, the Court noted that the expenditure of public funds weighed in favor of keeping the record open. The information in the deposition would have likely factored into the trial proceeding had the case actually gone to trial, and thus, would have been public.

The Court agreed that it was proper to order the release of the material.

JURISDICTION

Com. v. Johnson, 423 S.W.3d 718 (Ky. 2014)

FACTS: In 2009, Johnson became the target of a drug investigation in Powell County. Officers from Operation Unite and the Attorney General's Office (OAG) worked the case, using a CI to conduct controlled buys. No Powell County or other officer with jurisdiction in Powell County worked the case, and at that time, Operation Unite did not have an interlocal agreement with that county. Johnson was indicted and appealed, arguing that the OAG "was not invited to participate in the investigation pursuant to KRS 15.200 and thus, was without jurisdiction to conduct the investigation." The trial court ruled, however, that KRS 218A.240(1) "provided the OAG with clear authority to make arrests regarding controlled substances."

Johnson took a conditional guilty plea and appealed. The Kentucky Court of Appeals reversed is conviction, holding that the OAG was not vested with "statewide investigatory jurisdiction." The Government appealed.

ISSUE: Do Attorney General's investigators have statewide powers?

HOLDING: Yes

[68] 298 S.W.3d 846 (Ky. 2009).

DISCUSSION: The Court analyzed the various statutes being cited to support the opposing views of the parties. First, the Court looked to KRS 218A.240(1), which states that, along with a host of other peace officer agencies, the Attorney General, "shall enforce all provisions of this chapter" while "within their respective jurisdictions. The Court of Appeals ruled the term "jurisdictions" to be ambiguous. Looking to KRS 15.020 and 15.200, it concluded that "the only manner in which the OAG may become involved in a drug-crime investigation is to be invited into the local jurisdiction by certain state and local officials listed in KRS 15.200" – which had not been done in this case.

The Kentucky Supreme Court, however, noted that "in construing statutes, we must give effect to the intent of the General Assembly." The Court reasoned that in KRS 218A, the term jurisdictions "refers to the geographical jurisdiction of the local officers and entities enumerated in the antecedent phrases." The statute listed three entities with statewide jurisdiction, including that OAG. The Court agreed that the use of the term jurisdictions (plural) was important in the context of the overall sentence. "Thus, as a matter of syntax and common sense," the Court agreed that the OAG had jurisdiction to do drug investigations anywhere within the Commonwealth.

The Court recognized that there had been conflicting interpretations involving KRS 020/.200 involving the authority of the OAG in criminal investigations. The Court construed the language in that statute "to refer to the OAG's authority to act on behalf of the Commonwealth in a prosecutorial capacity. It ruled, as a result, that it "does not limit the independent investigatory authority of the OAG." It noted, specifically, that the AOT was authorized to form a "Special Investigations Division," which designates the investigators to be full peace officers, and to hold that that the Attorney General, as the "chief law enforcement officer," cannot be "held hostage" to a statute and to determine otherwise, "would achieve an illogical and absurd result."

The reviewed the history of the position and noted that "once an arm of the king (in England), the Attorney General is now the people's servant." Although the agency had to adapt to modern times, and "such investigative power may no longer be in full Elizabethan plume, it is still a feather in the Attorney General's cap." Finally, the Court noted that the investigators, in this case, "merely did what a private citizen could have done," by collecting evidence and bringing the matter to the local Commonwealth's Attorney, "resulting in an OAG officer testifying to that evidence under oath before a grand jury." They did not, in fact, actually arrest him prior to his indictment.

The Court ruled that the OAG's jurisdiction extends to the "territorial boundaries" of Kentucky. The reversal was overturned and Johnson's plea was reinstated.

Whitcomb v. Com., 424 S.W.3d 417 (Ky. 2014)

FACTS: In January, 2000, Whitcomb pled guilty to Theft by Deception in Fayette County. She received a one year sentenced, probated for five years, to be served in Harrison County. However, she failed to report to her probation officer and a bench warrant was issued. It was unserved for 11 years, until 2011, when she was arrested as during a traffic stop.

A probation revocation hearing was held, but the Court believed that it did not retain jurisdiction to revoke the probation due to the time lapse. The Commonwealth appealed and the Court of Appeals reversed, based on dicta in the case cited by the trial court, Conrad v. Evridge.[69]

In that case dicta, the Court had ruled that the "doctrine of estoppel may in the future prevent intentional absconders from asserting a jurisdictional argument." The court of Appeals agreed that Whitcome had, in fact, "intentionally absconded," and as such, she was "barred from claiming that her probation period had expired." The Court agreed that KRS 533.020(1) allowed for revocation under specific circumstances, but that otherwise, "once the period of probation had expired, the court no longer retained jurisdiction to hold a revocation hearing or to revoke the defendant's probation." In this case, her probation was to run for five years, and would have been automatically discharged at that point. As such, the issue before the Court "is whether the issuance of an arrest warrant tolls the defendant's probation period" so has to "prevent the automatic discharge."

ISSUE: If there are existing criminal proceedings, may a probation be automatically discharged by passage of time?

HOLDING: No

DISCUSSION: The Court agreed that KRS 533.020(4) was clear. To be "finally discharged," there must be no pending warrant and the probation must not have been previously revoked. If either exists, the probation could not be automatically discharged. The Court found it "nonsensical" to rule that the Court must have actually had a revocation hearing, since logically, if "one has absconded and cannot be located," a hearing cannot be held.

The Court agreed that the issuance of a warrant, before the expiration of the probation period, tolls the otherwise automatic discharge. The Court affirmed the Court of Appeals and remanded the case back to Fayette County.

MISCELLANEOUS

Leamon / Crisp v. Phillips, 423 S.W.3d 759 (Ky. App. 2014)

FACTS: On January 17, 2006, Child Protective Services (CPS) started an investigation concerning reported abuse of Leamon's children by her husband, Joseph. The anonymous caller stated that Leamon had been sexually abused by her father (Crisp) when she was young and that she and the children were now living in his home. The caller was later alleged to be Joseph's mother, Melinda Leamon. Adkins investigated the complaints, with branched out into additional allegations against Leamon. On January 27, the children were removed under an emergency order instigated by Roberts. On February 6, a hearing was conducted in Carter County and the children handed over to their maternal grandmother, to be cared for in the Leamon home. (Leamon was to vacate the premises and given supervised visitation, while Crisp was allowed no contact.)

On March 2, Roberts opined that the allegations were unsubstantiated and the matter was handed over to Phillips. However, it did not resolve in court until July 19, at which time the children were

[69] 315 S.W.3d 313 (Ky. 2010)

returned to their mother, with additional conditions. On October 24, the matter was removed from the docket.

Leamon and Crisp filed suit against the CHFS, Roberts, Phillips and Melinda Leamon. Roberts and Phillips claimed qualified immunity and quasi-judicial immunity. All three individuals claimed immunity under KRS 620.050(1), arguing they had "reasonable cause" to report child abuse. The trial court agreed that everyone was entitled to immunity. The two public employees were never shown to have been acting in bad faith, despite five years of discovery, and that after the initial hearing, they were protected by following a facially valid court order. (Further, the two CHS workers were held to have quasi-prosecutorial absolute immunity for bringing the initial petition.)

The Court noted that "Public officers and employees are entitled to qualified official immunity for negligent conduct, provided that the conduct arises in the good faith performance of discretionary acts."[70] The Court ruled that there was no indication that either acted in bad faith, and that for much of the time, they were acting consistent with court orders. Both were involved in discretionary acts within the limit of their authority. (For unrelated reasons, Melinda Leamon was also dismissed.)

[70] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

SIXTH CIRCUIT

FEDERAL WEAPONS LAW

U. S. v. Adams, 2014 WL 1259186 (6th Cir. 2014)

FACTS: During Adams arrest for trafficking in cocaine, officers found a short-barrelled shotgun, with its stock removed, and cocaine at his home. His sentence was enhanced because of the weapon, which the trial court considered a "destructive device" under 26 U.S.C. 5845(f), and he appealed.

ISSUE: Is a modified shotgun a destructive device under federal law?

HOLDING: Yes

DISCUSSION: The Court noted that a destructive device under that statute includes weapons with a bore of more than ½ inch in diameter, except for shotguns or shotgun shells. The Court, however, pointed out that the statute went on to further qualify the description as those which are "generally recognized as particularly suitable for sporting purposes." Certainly, it agreed, that the modified weapon was not so suitable and as such, the enhancement was proper. His sentence was affirmed.

U.S. v. Pennington, 2014 WL 715744 (6th Cir. 2014)

FACTS: Adkins, a Kentucky social worker, went to the Wests' home to investigate reported child abuse. Trooper Pennington accompanied her, they were allowed to enter. Trooper Pennington went to rouse Danny West, who was asleep, while Adkins spoke to Regina West. Pennington spotted a line of crushed hydrocodone and told Regina "that she could snort the line … without fear" of arrest. He also found a container of six Lortab (hydrocodone) pills and seized it, telling Regina that he would let it "all go away" if she would have sex with him. She gave him her cell phone number and then took her to the bus stop. (Adkins thought it was odd for him to drive her, but he told her that it was so she would coach the children.) On the way back, he made another explicit sexual suggestion.

Penning finally left after being told by Adkins he wasn't needed. Regina West took the child that was the subject of the complaint to the hospital, to be examined, Pennington "called her cell phone and asked to meet her at her home." Her sister listened in to the conversation, as West told him that she was at the hospital. He said his next "available time" would be at 3 a.m., 7 hours later.

West's sister contacted the Williamsburg police chief, who contacted Sgt. Walker (KSP). West agreed to audio/video surveillance. West called her at about 3:40 a.m. and said he'd be there in minutes. Sgts. Walker and Woods had already hidden surveillance equipment and were also hiding in a bedroom. Pennington arrived, still in uniform and armed. He gave West back one of the pills he'd taken and agreed that she would not be charged "if she acceded to his sexual arrests." He requested oral sex, upon which the KSP sergeants emerged and arrested him. The remainder of the pills were found in his vehicle, most were hydrocodone although was Diazepam and one was oxycodone.

Pennington was charged with drug trafficking and using a firearm in connection with it. He was convicted and appealed.

ISSUE: Does the mere presence of a firearm during a crime justify an enhancement?

HOLDING: No

DISCUSSION: Pennington argued that it was improper to charge/sentence him with respect to the firearm being carried in "relation to the drug trafficking offense." Pennington argued that the simple "presence of his service weapon on his person" … "was an example of the type of mere coincidence" that should preclude the weapons charge, which enhanced his sentence. The Court agreed that the distribution of the pill was not facilitated by the gun. Certainly, it did, however, embolden him and intimidate West into compliance with the requests for sex. As such, the firearm was carried "during and in relation to a state offense involving extortion and exertion of improper influence," but not drug trafficking.

The Court reversed the charge relating to the gun and remanded the case back for resentencing.

U.S. v. Hudgins, 2014 WL 783046 (6th Cir. 2014)

FACTS: Hudgins was the passenger in a vehicle which was stopped leaving a motorcycle club. Officer Zeolla had noted the vehicle had a cracked windshield. As he approached, he saw that Hudgins "was extending his left arm and hand from the front passenger seat to the rear floorboard" behind the driver. He could see there was a gun in that location and that Hudgins had was near to it. He did not know if he was "trying to conceal the gun or trying to arm himself." He ordered Hudgins to get his hands up and called for backup.

Officer Neville arrived and retrieved the gun, which was clearly visible from outside the vehicle. The driver testified that it was not his weapon, and no fingerprints were found – DNA was not tested.

Hudgins, a convicted felon was charged, and ultimately convicted. He appealed.

ISSUE: May a person found close to a firearm be considered to be "in possession" of it?

HOLDING: Yes

DISCUSSION: Hudgins contended there was no evidence that he "possessed the firearm." The Court noted that the evidence, which included contemporaneous video of the officer's reaction when he spotted the gun, refuted that. The Court upheld his conviction.

SEARCH & SEIZURE - SEARCH WARRANT

U.S. v. Beasley, 2014 WL 840823 (6th Cir. 2014)

FACTS: In April, 2010, Hoyle, a CI, was used to purchase crack cocaine from Beasley. Each time, he was equipped with an audio/visual recording device. He was also instructed, for safety, to leave his cell phone on so that officers could monitor the transaction, since there was no live feed on the recording device. Upon checking, however, it was discovered that the recording for the last transaction, on April 19, failed.

On April 20, Officer Taylor drafted the following search warrant.

> *Affiant has received information from police officers and a confidential source concerning possible illegal drug activity at [Bealey's residence], due to strange activity and a large number of traffic to and from said residence. Acting on the information, Affiant began an investigation into [Beasley's residence] …. A further check of []Beasley revieled [sic] that [] Beasley is currently on federal probation for distribution of crack and has an extensive federal criminal history ….*
> *Within the past 72 hours, Affiant used a confidential and reliable source to purchase Crack Cocaine from said residence. Affiants met said cs at a location …. Said cs was then equipped with an audio listening device and controlled US currency. Said cs then made contact with []Beasley, via cell phone, and the two arranged to meet at [Beasley's residence] to conduct a transaction. Said cs then went to [Beasley's residence] and made contact with a male black []Beasley. Said cs then conducted a transaction in which the controlled US currency was exchanged for Crack Cocaine. Said cs then left and met with Affiant at a predetermined location a short distance from said residence. Said cs then turned over the substance which was positive for Crack Cocaine and weighted approximately 9 grams. [Said cs] was monitored during said controlled buy.*

The warrant was signed; it was executed on April 23. Approximately 70 grams of crack cocaine and 5.8 grams of powder cocaine were recovered from the house and a truck, along with various paraphernalia. Beasely was indicted on three counts (one for each date).

Beasley demanded suppression, and was denied. He was convicted and appealed.

ISSUE: Do discrepancies in a search warrant affidavit mandate it be invalidated?

HOLDING: No

DISCUSSION: Beasley argued, first, that the affidavit "contained a statement that was false or made in reckless disregard of the truth," that Det. Taylor "mischaracterized the cell phone monitoring of Hoyle and led the state judge to believe he was actually monitoring the transaction." He also argued that the weights of the various drugs were reported inaccurately. The Court noted that monitoring did not just mean trying to listen through the cell phone what was happening, but included other methods, including visual observation and actions taken before and after the transaction to ensure that everything was done properly. The discrepancies, if any, were minor.

The Court also agreed it was proper to allow another officer to testify as an expert in drug use, particularly about latex gloves that were found at the scene. The officer testified that cocaine can be absorbed through the skin, hence the reason for the gloves. The court agreed that the judge gave a proper cautionary instruction, that the jury was free to disregard his testimony, and that the testimony might be useful in assisting the jury in understanding the reason certain items were considered significant. The Court agreed the error, if any, was immaterial.

The Court upheld Beasley's conviction.

U.S. v. Anderson, 2014 WL 627257 (6th Cir. 2014)

FACTS: In March 2010, a man robbed two locations in Oak Ridge, TN, using an AK-47. Surveillance video caught both. The clerk at the second robbery also gave a vehicle description. Officer Henderson viewed the video and on-duty officers began searching for the vehicle. A deputy sheriff linked Anderson with the vehicle and knew that he'd "recently acquired an AK-47." Henderson went to Anderson's home, which he shared with his grandmother. There, he spotted a vehicle matching the description. He and Officer Thomas noted that the vehicle was still warm and had obviously just been driven. They began surveillance, with a third officer and saw Anderson leaving the home. They immediately arrested him. Officer Huddleston searched the bedroom where Anderson stayed and found an AK-47 and several other items.

Officer Huddleston later testified that Anderson's grandmother had consented, but she denied having done so. Det. Coleman interviewed Anderson, who admitted having been at the robbery location that morning, but denied having committed it. He prepared a search warrant for the home, as follows:

> *Officers Jeremy Huddleston and Ray Steakley received consent from the home owner, Vernestine Anderson, to search the interior of her residence for evidence of the armed robbery of the Hampton Hotel. During this consent search of the residence the officers located a black assault rifle in the recess area of a headboard inside a bedroom of the residence, a red LG cell phone, a pair of diamond earrings, a red shoe string tied together to make a complete circle, a door key was attached to [t]he shoe string when found, and a black hooded pullover. Vernestine Anderson stated she had never seen the assault rifle before and it does not belong to her. All the other property belongs to her grandson Darius Lee Anderson, according to Vernestine Anderson.*

To describe the evidence sought, he included:

> *One men's red hooded pullover, one men's black or dark blue hooded pullover with large unknown print on back, an Atlanta Braves [b]aseball cap dark in color with the letter "A" on the front, a dark in color "stocking mask", and U.S. Currency taken during the armed robbery, which occurred at the Oak Ridge Hampton Inn Hotel ….*

However, the warrant, itself, did not include the above listing of the evidence, instead, it included a cut and paste recitation of the narrative of the crime itself, in which the desired items were embedded. The warrant was signed and immediately executed – two hooded sweatshirts and two Atlanta baseball caps were seized.

Anderson was indicted and moved for suppression. During a hearing, in which Anderson's grandmother testified that she did not give consent for the initial search, the magistrate judge recommended the suppression be granted, concluding that the warrant was facially invalid pursuant to Groh v. Ramirez.[71] The trial court, however, refused to suppress, ruling that the items would have inevitably be found, and that the narrative was sufficient to limit officers to the items listed in the warrant.

[71] 540 U.S. 551 (2004).

Anderson stood trial. During the testimony, an investigator testified about the video, to "clarify" it, using "specialized software to alter the lighting and playback speed of the videotape," because the original tape "was degraded from repeated use." Anderson was convicted and appealed.

ISSUE: May a flawed warrant still be considered sufficient?

HOLDING: Yes

DISCUSSION: The Court noted that in Groh, the officers had 'failed to identify any of the items that [the agents] intended to seize." In this situation, however, "officers could readily ascertain which items were subject to seizure based on the identifying evidence embedded in the narrative report of the Hampton Inn robbery." The Court agreed it was "readily distinguishable" from Groh.

In this case, although "the warrant was inartfully drafted and apparently never proofread," it was still sufficient to satisfy "the particularity requirement of the Fourth Amendment." Further, had it been necessary, the items found during the warrantless search would have been found during the search with a warrant two days later.

Anderson's conviction was affirmed.

U.S. v. Goodwin, 2014 WL 627257 (6th Cir. 2014)

FACTS: On December 16, 2011, Agent Hartnett (ATF) sought a search warrant for Goodwin's home. He was investigating the theft of a machine gun stolen in Ohio in August, 2011. Thereafter, one of the guns had been found in the possession of the victim's stepson and an investigation indicated he was trying to sell other guns as well, through a "self-described friend of McCormick, the stepson." On October 31, 2011, in an unrelated controlled drug buy, Watson, the dealer, stated he'd gotten "all his guns from McCormick." When interviewed by Agent Harnett, he said he had "brokered the sale of a machine gun" from McCormick to Goodwin, who had stated he intended to keep the weapon for himself. The agent stated in his search warrant that, due to his training and experience, such guns were often secured in the owner's home.

In the subsequent search, the weapon was found and Goodwin, a felon, was charged with possession of it. He moved to suppress and was denied. Goodwin appealed.

ISSUE: May information become stale?

HOLDING: Yes

DISCUSSION: Goodwin argued that the information provided was "stale," which, the Court agreed, is "tailored to the specific circumstances in each case." The length of time, while certainly important, "is not controlling." Even a substantial lapse of time is not enough to guarantee the information is not stale. The test for staleness takes "account of four factors:"

1. The character of the crime (chance encounter in the night or regenerating conspiracy?)
2. the criminal (nomadic or entrenched?)
3. the thing to be seized (perishable and easily transferable or of enduring utility to its holder?)

4. the place to be searched (mere criminal forum of convenience or secure operational base?).

The possession of the unregistered weapon by a convicted felon in question was a "continuous and ongoing offense," not a one-time event. Further, because firearms are "durable goods" – not a perishable item - that might be expected to stay in a criminal's possession for a long time, it is reasonable to believe that the individual would still have it, even some months, or even years, after the fact. Goodwin was entrenched since the place in question was his home, where he'd lived during the relevant time. Finally, the fact that the gun was at Goodwin's home, which could be considered a "secure operational base" where the illegal item would be kept.

The Court agreed that "all of the factors weight against a claim of staleness." Further, the affidavit clearly linked the gun with the residence, providing the appropriate nexus, as in the agent's experience, owners "usually keep machine guns in their homes."

Finally, with respect to the reliability of Watson, the informant, the Court noted that although it lacked any information about prior contacts and reliability, it did note that his information was provided in-person, he provided information against his own interest, and his information corroborated that given by another individual. In person tips are inherently more reliability.[72] If he gave false information, he might be subject to criminal liability. He was also thoroughly interviewed, and did not just provide a "tip" to the agent. Information against his own interest also heightened its credibility.[73] Finally, many of the details were independently corroborated by the officers.[74]

The Court agreed the warrant was sufficient and upheld the denial.

U.S. v. Herron, 2014 WL 627257 (6th Cir. 2014)

FACTS: In July, 2009, Sgt. Long (Jackson-Madison (TN) Metro Narcotics Unit, received info from a CI that Herron was selling drugs. His unit conducted a controlled buy in which the informant purchased crack cocaine from Herron, at a specific address. Two vehicles in Herron's name were in the driveway and the utilities were in his name. Sgt. Long drafted a search warrant for the house, which read as follows:

> … *that Affiant has RECEIVED INFORMATION FROM A RELIABLE CONFIDENTIAL INFORMANT WHO HAS OBSERVED CRACK COCAIN ON THE PREMISES OF 512 GREENWOOD JACKSON, TN 38301 IN THE PAST SEVENTY-TWO HOURS. THIS INFORMANT HAS BEEN PROVEN RELIABLE BY MAKING AT LEAST EIGHT CONTROLLED PURCHASES UNDER THE DIRECTION OF JACKSON-MADISON COUNTY METRO NARCOTICS UNIT. THIS INFORMANT IS RESPONSIBLE FOR THE SEIZURE OF APPROXIMATELY 4.9 GRAMS OF CRACK COCAINE. THIS CONFIDENTIAL INFORMANT HAS PURCHASED AN AMOUNT OF CRACK COCAINE FROM 512 GREENWOOD WITHIN THE LAST 72 HOURS. THIS ADDRESS HAS BEEN CONFIRMED BY JACKSON ENERGY AUTHORITY.*

[72] U.S. v. May, 399 F.3d 817 (6th Cir. 2005); U.S. v. Helton, 314 F.3d 812 (6th Cir. 2003).
[73] U.S. v. Harris, 403 U.S. 573 (1971).
[74] U.S. v. Tuttle, 200 F.3d 892 (6th Cir. 2000).

Sgt. Long received the warrant, which was executed several days later. They found, in the home, a number of firearms, crack and powder cocaine and cash. The home was fully furnished, as well, but was apparently unoccupied at the time. On October 7, 2009, another search warrant was executed. Herron was found asleep, along with his daughter, and a small amount of crack cocaine was in the house. He eventually pled guilty to state offenses.

Herron was indicted for being a felon in possession after that time, as well as for distributing. He was convicted and appealed.

ISSUE: Is it important to indicate why an informant is reliable?

HOLDING: Yes

DISCUSSION: Herron argued that the "veracity, reliability, and the basis of knowledge" for the informant's tip was insufficient to support the warrant. The informant had completed 8 previous controlled buys.[75] A buy had been made three days prior to the warrant being sought, and although the "affidavit [was] not thorough," leaving out several points that would have made it stronger, it was sufficient.

Herron's conviction was affirmed.

U.S. v. Green, 2014 WL 563255 (6th Cir. 2014)

FACTS: In April, 2008, Det. Johnson (Marion County SD) and a BATF task force officer began investigating allegations that Green was involved in drug trafficking in Pittsburg (TN). He had three prior drug trafficking convictions and a federal firearms conviction. Johnson learned through interviews that Green was selling crack cocaine from his home and two CIs made four controlled purchases from Green.

Johnson sought a search warrant for Green's home, listing crack and powder cocaine and a list of other related items. He planned to do it that same day, December 29, but learned that Green had decided not to have any drugs on site that day, having apparently catching wind that something might be occurring. On December 31, he told a CI that he would have "some weed" later – he was then observed driving to Chattanooga, where he stopped at an apartment, went inside briefly, and then returned to his home in South Pittsburg. At that time, he was detained and the warrant was executed.

The officers found a loaded firearm with ammunition, some marijuana and scales. He was in possession of $1,800 in cash. During the search, he was given his Miranda warnings. He waived his rights and admitted that he'd met with his cocaine source and was to get four ounces later that night. He admitted ownership of the revolver.

Green moved for suppression, arguing the warrant was not sufficiently supported. The motion was dismissed and Green was convicted. He appealed.

[75] See U.S. v. Smith, 182 F.3d 473 (6th Cir. 1999); McCray v. Illiniois, 386 U.S. 300 (1967).

ISSUE: If circumstances change before a warrant is executed, might that invalidate the warrant?

HOLDING: Yes

DISCUSSION: With respect to the search warrant, Green argued with the trial court's finding that "probable cause has not dissipated between the time the search warrant was issued and the time that it was executed." The Court agreed that "not only must there be probable cause 'at the time the judge issues the warrant,' but also 'at the time officers execute it.'"[76] When circumstances change, officers "should bring that information to the issuing magistrate."[77] However, even if the officer fails to do so, what is discovered will not be suppressed unless the court find that no "probable cause existed to conduct the search" at the time.

In this case, however, the Court agreed that probable cause did exist, due to the statements that he would "have some weed" later. "If anything, this statement corroborated that the house was being used to distribute drugs, and that would confirm the basis of probable cause."

Further, since the warrant included not just the drug itself, but also evidence of trafficking, the statement that he didn't have any drugs at a particular time was not dispositive, and did not mean that other evidence wouldn't be at the house.

The Court agreed that probable cause had not dissipated.

Green also argued that the search exceeded the scope, because they seized marijuana, not cocaine. However, the Court noted that the seizure was proper under plain view. Finally, he argued that his incriminating statements should have been suppressed. However, because the search which precipitated the statement was lawful, the warned statement was not the fruit of the poisonous tree.

Green's convictions were affirmed.

U.S. v. Fisher, 745 F.3d 200 (6th Cir. 2014)

FACTS: In May, 2010, DEA and a local task force received a tip from a CI that Fisher was involved in cocaine trafficking in Lansing (MI) and Chicago. The tip stated what his travel plans were, and the police attached a GPS to the vehicle. Relying on the tracker, and physical surveillance, they confirmed that he went to Lansing and returned to Escanaba. The next month they were told of another drug run, and again, the tip was corroborated by the tracking device. (it was not used in "live track" due to limited battery life. When Fisher returned to Michigan, he was stopped. A drug dog alerted and 3 ounces of cocaine were found.

Fisher was charged with federal drug trafficking. He moved for suppression and was denied. He took a conditional guilty plea and appealed. During the time Fisher's case was pending, U.S. v. Jones was decided by the Supreme Court.[78] As a result, it was remanded back for reconsideration.

[76] U.S. v. Archibald, 685 F.3d 553 (6th Cir. 2012).
[77] U.S. v. Bowling, 900 F.2d 926 (6th Cir. 1990).
[78]

Ultimately, the Court still ruled against suppression, finding that the good-faith exception applied. Fisher reasserted his appeal.

ISSUE: Is tracking via cell phone permitted without a warrant?

HOLDING: Yes

DISCUSSION: The Court agreed that when the GPS was used, the Sixth Circuit had previously held that the "warrantless use of electronic tracking devices was permissible." The Court looked to a number of cases, including U.S. v. Forest, in which law enforcement had pinged a drug trafficker's phone to track him.[79] In Forest (and similar cases), the Court had ruled that they could have obtained the same information simply by following him. Although a different technology, the Court found the two to be similar enough to agree that the officers acted in good faith in using the equipment.

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – TERRY

U.S. v. Davis, 2014 WL 552997 (6th Cir. 2014)

FACTS: On October 16, 2011, Officers Alam, Gardner and Simons (Detroit PD) were returning to a crime scene in a "semi-marked"[80] vehicle. Simons asked to stop to get water and Alam, driving, intended to stop at a nearby gas station. As they approached, he saw Davis standing at the corner, with his back against the wall. Alam made eye contact and later said Davis looked "nervous, scared." Simon and Gardner also spotted him. Davis started walking toward the gas station; Alam pulled in, near the building, and was immediately parallel to Davis.

Alam saw that Davis's pocket was "being weighed down by something," and saw Davis put his hand in the pocket. He noted that there was a "large bulge" that was "swinging in a 'pendulum effect.'" Alam, through his open car window, asked Davis to remove his hands from his pockets, which he did slowly. Alam could them clearly see the L-shape of a firearm in the pocket. Davis put his hand back in his pocket and continued walking.

Alam told his partners that "he's got it" and Simons jumped out. He approached Davis and asked him what was in his pocket. Davis responded with a scatological term that Simons interpreted to mean that Davis had "been caught with something." Simons grabbed Davis's arm and Davis stopped. Alam reached into the pocket and retrieved a revolver. Davis was arrested.

Davis was indicted for possession of the firearm, since he was a felon. He testified in a suppression hearing that although he did have a gun elsewhere on his person, what the officer saw was a pop bottle. The trial court suppressed the evidence and the Government appealed.

ISSUE: May a Terry stop be made without reasonable suspicion?

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[79] U.S. v. Forest, 355 F.3d 942 (6th Cir. 2004).

[80] The vehicle was a black Crown Victoria with a "large antenna and a push bumper" – but did not have exterior emergency lights or a decal.

HOLDING: No

DISCUSSION: The Court reviewed the facts. First, it noted, "both parties dispute" the moment the seizure occurred. The Government contended that a seizure occurred when Simons grabbed Davis, with Davis arguing it occurred when Alam pulled up alongside him. The Court did not find it necessary to make a precise ruling on that issue, however. The Court looked to the trial court's analysis of the facts under the totality of the circumstances, and noted that it "properly accorded some more weight than others." Specifically, the Court agreed that since Davis had just left the store, the bulge could have been purchases he made. His "conduct was ambiguous and subject to many different interpretations."

The court agreed the officers lacked reasonable suspicion and upheld the suppression.

U.S. v. Carrillo-Alvarado / Landeros-Sandoval, 2014 WL 866420 (6th Cir. 2014)

FACTS: On December 15, 2010, Officer Culver (Louisville Metro PD) received a tip about a semi carrying a "large load of marijuana" that would be arriving at a local auto repair shop. He had received tips from the same known informant before and also knew the auto shop as both a suspected "chop shop" as well as a "distribution point for drugs." Dets. Keller, James and Morgan, along with Sgt. O'Toole, responded, along with additional officers, to assist. The detectives and sergeant had extensive narcotics investigation experience. They were briefed on the overall investigation and the tip and told that surveillance had confirmed the presence of the truck.

Officer Culver left to get a search warrant and Keller and O'Toole "took up a surveillance position near the auto shop." The weather was "bitterly cold and alternated between rain and sleet." It was late in the day and all of the other businesses along that road were closed. Det. Lee, on foot with binoculars, reported that he saw containers being off-loaded from the truck with a forklift. About an hour later, he saw several vans leaving, and in moments, Keller and O'Toole saw two white cargo vans, two minivans and a sedan leaving the area of the shop. The vehicles split into two groups, with a van in each. The first group was stopped and the officers could smell the marijuana even from outside – it was found to be "packed with marijuana."

Keller and O'Toole followed the other grouping, a white van (driving by Sandoval) and a minivan, driven by Alvarado.. Additional officers moved to assist and observed the two vehicles clearly travelling together, as they were "driving in tandem." Although no one observed any traffic or other offenses, they signaled for the cargo van to pull over. It did so, promptly. Dets. James and Morgan continued to follow the minivan. Approaching the cargo van, both O'Toole and Keller "smelled a strong odor of marijuana." From the front, through wire mesh, they could see "large bundles commonly used to store marijuana stacked from the floor to the roof." The total amount was over a ton.

During that stop, Det. Morgan signaled the minivan to stop, again, not having observed any offenses. Alvarado continued for a short distance before stopping. He got out of the vehicle but "appeared nervous." Learning of the marijuana in the cargo van, they searched the minivan. Nothing specifically incriminating was found except a counterfeit detecting pen and a piece of paper with Sandoval's name. Det. James indicated he smelled marijuana and diesel fuel in the van and on

Alvarado himself. (Later both testified that diesel fuel/petroleum is used to mask the odor of marijuana.) The total seizure came to 2,546 kilograms, with an estimated value of $5.6 million.

Both men were indicted on several related charges related to distribution. Both were convicted and appealed.

ISSUE: May the knowledge of several officers be combined in finding reasonable suspicion?

HOLDING: Yes

DISCUSSION: Both men contested the legality of their respective stops. The Court agreed that first, it must assess "whether there was a proper basis for the stop, which is determined by examining whether the law enforcement officials were aware of specific and articulable facts which gave rise to a reasonable suspicion" of an offense. Then, it must consider ""whether the degree of intrusion into the suspect's personal security was reasonably related in scope to the situation at hand, which is judged by examining the reasonableness of the officials' conduct given their suspicions and the surrounding circumstances."[81] Under a totality of the circumstances assessment ""individual factors, taken as a whole, [may] give rise to reasonable suspicion, even if each individual factor is entirely consistent with innocent behavior when examined separately."[82] Law enforcement officers are allowed ""to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person."[83] Reasonable suspicion may "arise from a myriad of direct and indirect sources, including personal observations, informant tips, dispatch information, information from other officers, and more generalized factors, such as the nature of the area, the weather conditions, and the time of day."[84] In addition, under the "collective knowledge rule," "an officer may conduct a stop based on information obtained by fellow officers . . . even when the evidence demonstrates that the responding officer was wholly unaware of the specific facts that established reasonable suspicion for the stop."[85]

With respect to this situation, the Court noted the original informant was known and had provided prior assistance, and was corroborated by the subsequent arrival of a vehicle that matched the information given. They also had an "investigative history" and current observations. The manner in which the vehicles then traveled together "further supported reasonable suspicion." As such:

> Taken altogether, especially in light of the collective knowledge rule, the combination of (1) the informant's tip, which was corroborated by the presence and description of the tractor trailer; (2) the prior two-year investigative history, which was briefed to the officers; (3) the activity witnessed by Lee, specifically the unloading of the tractor-trailer at night during inclement weather at a suspected drug distribution location after business hours; (4) the officers' observations that, shortly after unloading vehicles, two sets of vehicles left the location and drove in tandem on a wintry night when few cars were on the road; and (5) the

[81] U.S. v. Garza, 10 Case Nos. 13-5101/5119 U.S. v. Carrillo-Alvardo, et al. F.3d 1241 (6th Cir. 1993).
[82] U.S. v. Smith, 263 F.3d 571, 588 (6th Cir. 2001).
[83] U.S. v. Arvizu, 534 U.S. 266, 273 (2002)
[84] See Illinois v. Wardlow, 528 U.S. 119, 129–30 (2000); Dorsey v. Barber, 517 F.3d 389, 395 (6th Cir. 2008); U.S. v. Pearce, 531 F.3d 374, 380 (6th Cir. 2008).
[85] U.S. v. Lyons, 687 F.3d 754, 765–66 (6th Cir. 2012).

officers' training and experience investigating drug trafficking, more than fulfill the reasonable suspicion Finally, although the officers had, apparently, agreed that any vehicles leaving would be stopped, the validity of the stop had to be evaluated at the point they actually made the seizure.

The Court agreed that once each vehicle was stopped, the marijuana was located and the arrests made within minutes. Nothing occurred until the officers, in each case, smelled the viewed the marijuana. The Court upheld the stops and seizures in each case, and affirmed the convictions, after resolving several other trial related issues.

U.S. v. McMullin, 739 F.3d 943 (6th Cir. 2014)

FACTS: On May 3, 2011, Officers Hampton and Lyons (Detroit PD) were dispatched at a breaking & entering occurring at an occupied home. Mays reported that "three people were attempting to break through her front window." They arriving in less than ten minutes, parked a few houses away and approached on foot. They spotted McMullin "standing close to the front of the caller's home." He began walking in their general direction and they told him to "stop and show his hands." He put down the beer he was holding and complied. They frisked him for weapons. Later, both Mays and Taylor (Mays' boyfriend) said they tried to tell the officers that McMullin was not the perpetrators, but the officers denied having had any contact with the couple at the time they encountered McMullin.

During the search, the officers recovered a revolver. As he lacked a permit, he was arrested. They learned afterward that McMullin was not involved in the alleged break-in. When he was found to be a convicted felon, he was charged with the weapon. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must the reasonable suspicion for a frisk be considered separately than what is needed for the stop?

HOLDING: Yes

DISCUSSION: The Court noted that "although Terry clearly establishes that an officer's reasonable suspicion required to justify a stop of a suspect is different from that required to justify a frisk of a suspect." The Court noted that all that was required for the stop was "reasonable suspicion," in this case, that the subject was involved in an ongoing breaking and entering call. With respect to the frisk, the Court noted that a number of "sister circuits have found that a reasonable suspicion of burglary [is] sufficient to justify a frisk of the suspect." In this situation, "based on the totality of the circumstances, the officers had a particularized and objective basis for suspecting McMullin of the reported criminal activity." The Court agreed that during an initial encounter, concern for one's safety might be dispelled, but that was not the case in this situation. The situation in this case clearly supported a reasonable concern that McMullin was armed and dangerous.

The Court upheld the stop and frisk, and McMullin's plea.

U.S. v. Carter, 2014 WL 943334 (6th Cir. 2014)

FACTS: Carter, along with at least four others, was involved in a heroin-trafficking conspiracy in Columbus (OH). In late 2011, Det. Whitacre received a tip that Paco (Carter) had supplied heroin to a drug house and was doing street sales, and provided Paco's phone number. The phone number was tracked and led police to Carter's address, and an informant provided them with the second address from which drug trafficking was done. Whitacre later testified the CI had previously supplied accurate information.

Police began surveillance on the second address and eventually got a search warrant. In executing it, they found 800 units of heroin. One of Carter's co-conspirators was linked to a third home, where evidence was found during a trash pull. Although Carter's cell phone records indicated he'd visited the second address, the police never observed him there. However, the co-conspirator at the third house was tailed to meetings with Carter and they were observed entering and then leaving another location, very quickly, in a manner consistent with a drug transaction. Officer Whitacre asked Officer Wildman to make a stop of Carter following such a transaction. Seeing Officer Wildman pass Carter, initially, he radioed him to come back, and Wildman made a U-turn.

Wildman later testified that Carter watched him turn the car around with a "nervous, concerned" look. He then took several small steps backward, then turned and took a few more small steps. Wildman shouted at him not to run and that "I know you've got a gun." He later admitted he had no reason to think that, but that he used that tactic "regularly to avoid having to chase a younger suspect who was likely to outrun him." Since most of the time, the individual did not have a gun, they would usually just stand still. "Carter, however, did not follow this pattern" but instead, dropped to the ground, which made the officer think that perhaps, Carter did have a firearm. Wildman did a quick frisk of Carter, at the belt line, and felt the butt of a handgun. He stood him up, searched him, finding heroin. Carter admitted he'd stopped because he didn't want to get shot.

Carter was indicted for possession of the heroin and for the gun (being used in a drug transaction.) He moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May suspicion for a stop be obtained from a "fellow officer?"

HOLDING: Yes

DISCUSSION: Carter argued that Wildman's stop was improper. The trial court had first looked at the CI's communication about Carter (Paco), and noted that a "fair amount" of what he'd provided to Whitacre had been confirmed, and as such, the CI's tip was reliable to support the stop. Further, although the high-crime designation for the neighborhood was not persuasive, it could be considered in conjunction with the other information. Finally, with respect to Carter's "agitated response to Wildman's approach," the Court agreed that his behavior could be considered, in particular that he abruptly changed course in the middle of the street, and increased his pace to walk away, sufficient to apply Wardlow.[86]

Although none of these factors would, standing alone, justify a warrantless stop, collectively they establish an 'articulable suspicion … based upon an assessment of all circumstances surrounding the actions of a suspected wrongdoer."[87] However, a valid stop does not automatically justify a frisk.[88]

[86] Illinois v. Wardlow, supra.
[87] U.S. v. Knox, 839 F.2d 285 (6th Cir. 1988)

The trial court had found three factors set forth by Wildman to be enough to do so, however: Whitacre's claim that Carter had recently conducted a drug deal; Carter's nervousness; and Carter's unusual response to Wildman yelling "I know you have a gun."

The Court agreed that Wildman was allowed to invoke the "fellow officer rule" and "conduct a stop based on information obtained" from Whitacre.[89] Further, it was reasonable to presume that someone involved in trafficking would be armed.[90] His nervous behavior and unexpected "sprawl" on the ground only heightened that, along with Carter's abortive actions suggesting an intent to flee.

The Court affirmed the denial of the motion to suppression and upheld the plea.

U.S. v. Parrett, 2014 WL 166223 (6th Cir. 2014)

FACTS: In 2006, Officer Banks received "an anonymous phone tip that drugs were being sold from 1550 Carpenter Street." Officers Banks and Bates knocked on the door, Parrett answered and identified herself as the occupant. She agreed to the officers' request to "walk through and look around," also signing a consent form. In the kitchen, they spotted cocaine and plastic wrappers with residue. In the laundry room, they opened the washing machine and found a large amount of cocaine. In a safe in the bedroom, they found additional items, including a loaded firearm and over $22K in cash.

Parrett was arrested. Under questioning, she also stated that Nolen and Halliburton had come to the house to cook cocaine, as then done a number of times before. She was charged with various federal drug offenses, as were the two men. She moved for suppression, which the trial court granted, finding that she signed the consent form after critical evidence had been found and that the officers exceeded the scope of her permission when they opened the washing machine. (Only the drugs in the washing machine were suppressed, not that found in plain view.) Parrett was tried, but only convicted of "maintaining a drug-involved premises." She appealed.

ISSUE: Is consent presumed to be valid even under an assertion that the individual is somehow impaired?

HOLDING: Yes

DISCUSSION: Parrett argued that she "did not voluntarily consent to a search" of her home. She stated that she was "still groggy from migraine medication" at the time she encountered the officers. However, the officers testified that she did not appear to be impaired or under the influence of anything at the time. The officers did not draw their weapons or threaten her in any way.

Parrett's conviction was affirmed.

U.S. v. Luna-Santillanes, 2014 WL 166223 (6th Cir. 2014)

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[88] Bennett v. City of Eastpointe, 410 F.3d 810 (6th Cir. 2005).
[89] U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012).
[90] U.S. v. Hardin, 248 F.3d 489 (6th Cir. 2001)

FACTS: Since October, 2010, DEA agents had been investigation a drug-trafficking operation that involved Santillanes. On March 4, 2011 they learned that Jimenez (who was associated with Santillanes) was using a specific telephone and contacted a confidential source that he was expecting a shipment of cocaine. Using that, one of the ATF agents requested a warrant for location information for the phone, hoping to find a stash house. They also identified a particular house and vehicles associated with Jimenez.

On March 23, the CI called Santillanes and requested a sample of heroin. Along with an undercover officer, the CI went to the meeting location and obtained the sample. Santillanes arrived in one of the identified vehicles. On April 13, the CI told agents that two vehicles would be taken to pick up cocaine and that Santillanes would not be in the same car as the drugs. Trackers were placed on both vehicles.

The next day, the phone and the two vehicles were tracked into Detroit and a traffic stop was made by Michigan State Police, at the request of the agents. The driver of one consented to a search and 3 bricks of heroin were found. The GPS trackers were removed by the agents, the phone was apparently no longer being used.

On May 1, the CI told the agents about a new vehicle being used, a rental care. They attached a GPS tracker to that vehicle and another vehicle. After additional investigation, the agents obtained a search warrant for the residence. Weapons, another telephone that had been identified and various items were collected, including photos of Santillanes holding weapons found in the house. Santillanes was arrested two weeks later, in possession of 2 kilos of cocaine and another handgun.

Santillanes was indicted. He moved for suppression, and was denied. He was ultimately convicted and appealed.

ISSUE: Even if evidence if obtained unlawfully, may evidence still be admitted if it would have been lawfully obtained using a different method?

HOLDING: Yes

DISCUSSION: Santillanes argued that his rights were violated when they attached the GPS to the initial vehicles. The Court noted that even if it was incorrect to use the device, the agents would have obtained virtually the same information (the location of the vehicle) using the location data from the telephone, for which they did have a warrant. As such, they had a valid independent source and the evidence obtained at the traffic stop was admissible.

With respect to charges of possessing the weapons found at the house, the Court noted that Santillanes was found in the bedroom where a handgun was also located and that his cell phone was also in that room. As such, it was proper to find him in constructive possession of that gun. The remaining long guns and another pistol were found elsewhere, but photos from his cell phone showed him holding the two long guns at an earlier time. He also was shown to be present when the second handgun was removed from a hole in the yard. The Court agreed that it was proper to find him in constructive possession of all the weapons. As for a charge of possessing a weapon in furtherance of drug trafficking, one was found in the minivan in which the cocaine was found, in a cavity behind the glovebox . The Court agreed that its proximity was sufficient to find that it was used in conjunction with the drug trafficking.

Santillanes' convictions were affirmed.

INTERROGATION

U.S. v. Soto-Eseberre, 2014 WL 1228340 (6th Cir. 2014)

FACTS: Soto-Eseberre was arrested on various drug trafficking charges. As the officers were executing a search warrant, they later testified, He "complied with their verbal commands that were given in English." He was also able to complete "the booking process without difficulty, conversing and answering questions in English. At the interrogation following, he was given Miranda warnings verbally, in English and also given printed warnings in Spanish. He confirmed to the officers that he understood the warnings and that he agreed to be questioned. He was convicted and appealed.

ISSUE: Must someone who apparently speaks adequate English be given oral Miranda warnings in their native tongue?

HOLDING: No

DISCUSSION: The Court agreed that under the facts shown, he adequately understood his rights and voluntarily waived those rights. His convictions were affirmed.

U.S. v. Chalmers, 2014 WL 521195 (6th Cir. 2014)

FACTS: On December 6, 2008, Memphis officers executed a search warrant at a duplex. One side was occupied by Chalmers, Brinch and Montgomery; the other side was vacant. Marijuana and a firearm was found in the occupied side. Chalmers was arrested. He was given Miranda, and he invoked his right to remain silent, both verbally and in writing.

Chalmers was taken to the Shelby County Jail. On the way there, he could hear the officers' conversation in the front of the cruiser. Upon arrived, the officers remained in the car, completing their paperwork, with Chalmers still in the back. Officer Crosby noted to his partner that they had not yet verified the origin of the firearm, and that normally, that would have been done immediately. Officers later testified that it was standard policy to check firearms before processing them as evidence. Officer Crosby contacted dispatch to run the firearm. Dispatch asked if the radio was "secure," to which Officer Crosby agreed. Dispatch provided him with a coded response indicated that the weapon was "wanted or stolen." After hearing that, Chalmers "initiated a conversation with" the officers. He asked if the gun was stolen and was told that it was. He stated he didn't steal the weapon but had bought it "off the street."

Chalmers, a felon, was indicted for possession of the firearm. He moved to suppress, but was denied. Chalmers was convicted and appealed.

ISSUE: Is "questioning" always verbal?

HOLDING: No

DISCUSSION: The Court noted that the parties agreed "that the officers did not expressly question Chalmers." As such, the Court discussed whether they engaged in the "functional equivalent of express questioning. Functional equivalency was defined as "any words of actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the subject."[91] In Rhode Island v. Innis, the Court addressed a very similar set of facts.[92] In that case, the Court noted:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

The Court also looked at Edwards v. Arizona, in which it held that a subject is "not subject to 'further interrogation … unless the accused himself initiates further communication, exchanges, or conversations with the police.'"[93]

In addition:

> This rule, called an "Edwards initiation," offers "clear and unequivocal guidelines to the law enforcement profession."[94] An Edwards initiation occurs when, "without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case."

Since that time, the Court has agreed that every "bare inquiry" or comment isn't necessary an opening to additional questioning, but in this case "Chalmers started the conversation and his voluntary communication cannot form the basis of a Miranda violation." In this case, "Crosby and Graves were merely completing paperwork before processing evidence when Chalmers asked whether the gun was stolen." Instead, the "critical point is that Chalmers's comments were not made at the insistence of the authorities."[95]

The Court upheld his convictions.

42 U.S.C. §1983 - HECK

D'Ambrosio v. Marino, 2014 WL 1243792 (6th Cir. 2014)

FACTS: In 1989, D'Ambrosio was convicted in Ohio of murder, and sentenced to death. In 2008, his writ of habeas corpus was granted, based on the failure of the prosecution to share "material exculpatory evidence" in violation of Brady v. Maryland.[96] The writ required the state to either vacate his conviction or retry him. Ohio attempted to prosecute him again but "continued to

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91 Pennsylvania v. Muniz, 496 U.S. 582 (1990).

92

93 451 U.S. 477 (1981).

94 Minnick v. Mississippi, 498 U.S. 146 (1990).

95 *See* Arizona v. Mauro, 481 U.S. 520 1987)

96 373 U.S. 83 (1963).

fail to disclose exculpatory evidence and failed to alert D'Ambrosio or the state court that its key witness had died in the interim." Finally, the conditional writ was made unconditional, and Ohio was barred from reprosecuting him. Further appeals continued, however.

In the meantime, D'Ambrosio had filed suit under 42 U.S.C. §1983, making claims about the prosecutors for failing to disclose the information, claiming it was as a result of an official policy, practice and/or custom that resulted in the violation of his rights. Another claim was made against the lead Cleveland officer, who also failed to disclose the information.

The District Court ruled in favor of the defendants, and D'Ambrosio appealed.

ISSUE: May a claim which invalidates a conviction be maintained?

HOLDING: No

DISCUSSION: The first issue the Court had to wrestle with was whether the claim was timely, or whether the statute of limitations had run. The defendants argued that the time began to run when the conditional writ was issued in 2006, to which D'Ambrosio countered, arguing that it did not begin "until after the state court criminal proceedings against [him] 'terminated"' in his favor – and that was not until the state was barred from retrying him. The Court took a middle position – noting that the correct rule is that the cause of action will accrue "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief."[97] In this type of case, it would require an examination of the underlying event – in this case, he "discovered that the exculpatory evidence in question had not been disclosed to him."

However, under Heck, a §1983 action could not process "where success in the action would necessarily imply the invalidity of a criminal conviction…." In such cases, the cause of action would not accrue "until the conviction is reversed or expunged."[98] However, in this case, the fact that his claims under §1983 "might impugn an anticipated future conviction" did not trigger the Heck bar.

In short, until his state conviction was vacated, Heck barred his ability to make a claim, and that occurred when the unconditional writ (rather than the earlier conditional one) was issued. As such, his lawsuit was filed in a timely manner.

However, the prosecutors in the case enjoyed absolute immunity. With respect to claims against the employing county, D'Ambrosio complained that they "habitually ignored criminal defendants' rights." However, his allegations, focused on the actions of a particular prosecutor, did not point to a pattern of unconstitutional actions of which the county would be aware.

With respect to the detective, the Court noted that "while a police officer's concealment of material exculpatory information may ultimately result in a Brady violation, the role that a police officer plays in carrying out the prosecution's Brady obligations is distinct from that of a prosecutor" – as officers do not generally directly disclose evidence to the defense.[99] Specifically, the detective was never

[97] Heck v. Humphrey, 512 U.S. 477 (1994); Wallace v. Kato, 549 U.S. 384 (2007).
[98] Wolfe v. Perry, 412 F.3d 707 (6th Cir. 2005).
[99] Moldowan v. City of Warren, 578 F.3rd 351 (6th Cir. 2009).

required to disclose the information to the defense. The requirement that he make it know to the prosecution requires a finding that its exculpatory nature was apparent to the officer. The complaint argued that he was "privy to" certainly pieces of information – but not that he was aware of evidence of which the prosecution was ignorant. There were no specific allegations concerning evidence of which documents he allegedly withheld.

The Court upheld the dismissal of the complaint.

42 U.S.C. §1983 - FORCE

Eggleston v. Short, 2014 WL 1257941 (6th Cir. 2014)

FACTS: Following a high speed chase, Eggleston stopped his vehicle and Officer Short (unnamed Tennessee agency) "forcefully removed him from his truck and took him to the ground in order to obtain access to the truck and turn off the ignition." Eggleston was later determined to be well above the legal limit to be considered DUI. During the takedown, he suffered serious facial injuries, including a broken jaw and damage to his teeth, along with a broken hand. The takedown was recorded by the officer's dashcam.

Short requested qualified immunity. The trial court ruled that while the arrest was valid, there was question as to the necessity of the force used and whether Short could have taken action to avoid at least some of the injuries sustained by Eggleston. Short appealed.

ISSUE: Must the Court use the plaintiff's version of events in a qualified immunity evaluation?

HOLDING: Yes

DISCUSSION: The Court noted that it was required to "look to two factors: (1) whether the action violated a constitutional right; and (2) whether that constitutional right was clearly established such that a reasonable officer would understand that what he is doing would violate that right." Further, if the law enforcement officer challenges the plaintiff's version of the facts, "an issue of fact is created, and qualified immunity must be denied."[100] In this case, the trial court ruled that the video was ambiguous, and could support Eggleston's view that the force used was excessive.

The Court agreed that it lacked jurisdiction to rule in favor of Short.

Brown v. Weber, 2014 WL 552998 (6th Cir. 2014)

FACTS: On December 22, 2010, Hardee's restaurant patrons called 911, "reporting that an apparently intoxicated man was creating a disturbance." One caller was hiding in the restroom because of it. She reported that "the man had fallen over chairs, dropped his coffee, and was stumbling around and using foul language." Surveillance video also showed he was trying to "drink from the soda fountain and climbed over the counter to the employee-only area of the restaurant." Sgt. Weber and Deputy Pratt (Decatur County Sheriff, TN) arrived. They found

[100] Johnson v. Jones, 515 U.S. 304 (1995).

Brown sitting on the counter pulling his shirt off, with an employee "imploring him to get off the counter." He did not respond to the officers speaking to him. Weber later testified that he went behind the counter, pulled Brown off the counter and tased him after he assumed a "fighting stance." (The video showed it be slightly different.) After the first shock, "Brown fell to the floor, face down, and began to state that his blood sugar was low." The officers stated he was still combative, however, and would not remove his arms from under his body to be handcuffed. He was tased twice more, with only seconds in between. Finally, he was handcuffed, removed from the restaurant and ultimately shackled. He was allegedly placed face down in a police car and taken to the hospital, where his blood sugar was found to be 34, dangerously low. He was not charged and ultimately released to his parents.

Brown filed suit. He asserted that he had continuously tried to explain his blood sugar was low, and noted that his driver's license indicated he was an insulin dependent diabetic. He noted that his behavior was typical of his condition. Both officers asserted qualified immunity. The Court ruled in favor of Pratt and some of the claims against the county, but denied it to Weber. Weber appealed.

ISSUE: May a Taser be used against someone who is not actively resisting arrest?

HOLDING: No

DISCUSSION: The Court agreed that assuming Brown did not actively resist arrest, that the use of the taser was against clearly established law at the time. Under Brown's version of the facts, supported by the video, the Court agreed that he "posed little to no immediate threat" to anyone. The Court questioned the first use of the taser and noted that the "second and third taser charges are even less justifiable." The Court specifically stated that there "simply was no time" between each for Brown to even begin to comply, if he was able. The facts indicated that all three tasings took place within 16 seconds, with the latter two coming right on top of the other, and that clearly amounted to excessive force.

The Court upheld the denial of qualified immunity.

42 U.S.C. §1983 - FORCE

Bronzino v. Clinton Township Police Sergeant Dunn, 2014 WL 982770 (6th Cir. 2014)

FACTS: Bronzino sued Dun and others for allegedly using "excessive force in executing his arrest for delivery of analogues ("designer drugs"). All received summary judgment but for Dunn, finding that in his case, material questions of fact precluded him from a qualified immunity defense. At the time of the trial, Bronzino, age 19, moved to have his already lengthy criminal history excluded as irrelevant. Dunn argued that since he already knew the history at the time of the arrest, it was relevant to his state of mind at that time. Further, the incident in which they were involved also resulted in a plea for robbery.

At trial, Dunn was found not liable. Bronzino appealed.

ISSUE: May a criminal record be used against a plaintiff?

HOLDING: Yes

DISCUSSION: Bronzino argued that "his criminal record was not relevant and therefore inadmissible" under the federal rules. The Court agreed that Bronzino did not make a timely objection, but that it was also clearly not improper to allow the disputed evidence, even though it could be used to show his bad character.

The Court upheld the decision in favor of Dunn.

42 U.S.C. §1983 - MALICIOUS PROSECUTION

Jordan v. City of Detroit, 2014 WL 657751 (6th Cir. 2014)

FACTS: On October 30, 2007, Richardson was robbed and killed in Detroit. His fiancée, Milliner, witnessed it from a window and described one of the robbers. Soon thereafter, officers stopped Jordan and his brother (Massey) because Jordan arguably fit the description. Massey was released but Jordan was held on a curfew violation. He was taken back to the scene in the cruiser. There, an officer pointed to him and asked Milliner if he was the shooter, Milliner agreed. Jordan was arrested.

She identified him again at a preliminary hearing and he was subsequently indicted. However, several months later, when Milliner did not appear at trial, the charges were dismissed without prejudice. Unbeknownst to Jordan, a few days after the shooting Milliner had identified someone else as having been the shooter.

During the interim, Jordan, age 17, had been housed with adult prisoners for four months. During that time, he was allegedly subjected to physical threats, verbally abused by jail officers and actually attacked at least twice.

Jordan filed suit against the arresting officers and the jail officials. The Court found in favor of the government defendants and Jordan appealed.

ISSUE: Does a malicious prosecution claim require a policy or custom?

HOLDING: Yes

DISCUSSION: First, Jordan brought a malicious prosecution claims. Such claims require that first, "a prosecution was initiated against the plaintiff and that the defendant participated in the decision," second, that "there was a lack of probable cause for the criminal prosecution," third, that "the plaintiff suffered a deprivation of liberty as a consequence of the legal proceedings" and last, that "the criminal proceeding was resolved in the plaintiff's favor." The Court agreed that there was no evidence of a policy or custom that led to his prosecution, and as such, it was proper to find in favor of Detroit.

The Court affirmed the summary judgment in favor of the defendants.

42 U.S.C. §1983 - FOURTH AMENDMENT

Key v. Shelby County, 551 Fed.Appx. 262 (6th Cir. 2014)

FACTS: Key sued the Shelby County (TN) Sheriff's Office for alleged violations of her Fourth Amendment rights during a search warrant execution. The SCSO had received information that Key's husband was a marijuana distributor; he was arrested and a search warrant requested. A number of deputies responded to the house and using a key provided by her husband, entered the house when no one answered. They removed two minor children during the search, which yielded marijuana, drug paraphernalia, cash, a handgun and related items. Shea alleged that the removal of the children was unlawful, and that the deputies "ransacked and damaged her home, "ate her food, drank her beverages," and occupied themselves with items not related to the search warrant. The District Court gave Shelby County summary judgment on all claims, and Key appealed.

ISSUE: To uphold an action against a governmental entity, is it necessary to prove a policy or custom?

HOLDING: Yes

DISCUSSION: The Court noted that in order to hold Shelby County liable, Key would have to prove that the alleged harm "was caused by a constitutional violation," and that Shelby County was responsible for that violation.[101] To satisfy the first, she would need to" (1) identify the municipal policy or custom, (2) connect the policy to [Shelby County], and (3) show that [her] particular injury was incurred due to the execution of that policy."[102] ".In sum, Key must connect the alleged constitutional violations to an official SCSO policy or custom."[103] Her claim asserted that SCSO failed to supervise the deputies adequately in "implementing proper and non-abusive search and arrest procedures." Such a claim may amount to "an official policy or custom where the failure to supervise amounts to deliberate indifference."[104]

The District Court had ruled that she had failed to identify a policy or custom that was behind the alleged violations – other than that Shelby County employed the deputies. The County "cannot be held liable on a respondeat superior theory." However, she offered no proof that the deputies "exhibited any pattern of behavior wherein they acted unlawfully, inappropriately, or with deliberate indifference …."[105] Key "present virtually no support for this alleged policy" other than an bare assertion that it does exist, although SCSO has official policies that do, in fact, "teach proper search and arrest techniques." Further, to her assertion that a now-convicted deputy was permitted to participate in the search, there was no evidence that they did, in fact, have any knowledge of it at the time of the search.[106] Further, there was no proof that the deputy was involved in any of the alleged acts, as Key was not present during the search.

The Court affirmed the dismissal of the case.

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[101] Collins v. City of Harker Heights, Tex., 503 U.S. 115 (1992).
[102] Alkire v. Irving, 330 F.3d 802 (6th Cir. 2003);
[103] In sum, Key must connect the alleged constitutional violations to an official SCSO policy or custom.
[104] Leach v. Shelby Cnty. Sheriff, 891 F.2d 1241 (6th Cir. 1989).
[105] *See* Miller v. Calhoun Cnty, 408 F.3d 803 (6th Cir. 2005)
[106] The deputy was convicted of two counts of depriving individuals of their civil rights, but there was no indication the department was aware of the investigation at the time of the search.

42 U.S.C. §1983 - QUALIFIED IMMUNITY

Younes v. Pellerito, Cochon and Beedle-Peer, 739 F.3d 885 (6th Cir. 2014)

FACTS: On June 9, 2010, Dearborn (MI) PD officers responded to a report that Younes was standing in Yassine's front yard staring in his kitchen window. Yassine reported that Younes appeared intoxicated. Sgt. Beedle-Peer arrived and talked to Yassine, and then crossed the street to Younes' home. From this point, "accounts of what occurred diverge." Younes claimed that he was sitting on his front porch when his dog took off after a rabbit. He followed, to retrieve the dog, and had words with Yassine. He then claimed to have been attacked bot a police officer "without warning." He claimed additional officers kicked and beat him, but denied that the "female officer touched him in anyway [sic] and denied that he had consumed alcohol …." A neighbor claimed that two male officers struck him and kicked him, and then left, and that afterward "Younes got up and walked away."

The officers' accounts were quite different. Sgt. Beedle-Peer approached Younes, who "did not respond and appeared angry." She said when he tried to stand up, he "was unsteady on his feet." Officer Ciochon and Pellerito arrived. Both agreed that his breath smelled like he'd been drinking. The three officers and Yassine all testified that "Younes lunged" at Sgt. Beedle-Peer and that the male officers then tackled and arrested him. They stated that he hit his head on the screen multiple times on the way to the police station.

In his subsequent lawsuit, under 42 U.S.C. §1983, Younes claimed excessive force and false arrest. Younes submitted medical records in support of his claims. The officers requested summary judgment, which was denied, with the court finding there were "genuine issues of material fact" remaining. The officers appealed.

ISSUE: In a qualified immunity assessment, must the Court use the plaintiff's version of the facts?

HOLDING: Yes

DISCUSSION: The Court noted that although the "officers state they are conceding the view of the facts most favorable to Younes, yet their arguments dismiss or ignore relevant aspects of Younes' account and treat their own account of the facts as undisputed." The Court agreed that when the plaintiff's account is "'so utterly discredited by the record' as to be rendered a 'visible fiction,' it can be disregarded.[107] The Court agreed that the "officers' testimony of the incident is not the type of evidence in the record" which would count as totally discrediting. (The opinion did not mention the independent witness, Yassine.)

The officers also contended that the District Court "failed to assess the individual liability of each officer." The Court, however, ruled that the officers "failed to satisfy the jurisdictional requirement to appeal a denial of qualified immunity." As such, the Court was left with "precisely the sort of factual dispute over which this Court lacks jurisdiction."

[107] Scott v. Harris, 550 U.S. 372 (2007); Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009).

The court dismissed the officers' appeals.

TRIAL PROCEDURE

Sussman v. Dalton, 2014 WL 185382 (6th Cir. 2014)

FACTS: Deputy Dalton (Washtenaw, MI) was dispatched to a theft at a Laundromat. The customer had left her wallet unattended and discovered that money was missing. Three individuals, including the victim, indicated that Sussman was a potential suspect. A review of the video seemed to indicate that was the case. Sussman denied having committed the theft. In a later interview, she stated that "the video probably showed her going through her own wallet" – which was similar to the victim's. Months later, however, Sussman was arrested, charged with larceny and released. While copying the security footage, however, the deputy realized that in fact, someone else could be seen committing the actual theft. He notified the prosecution and the charges were dismissed against Sussman.

Sussman sued Dalton on a multitude of claims. Dalton moved for summary judgment and dismissal. The trial court granted dismissal on two of the claims, but denied the rest. Dalton moved for a reconsideration, which was accepted, but still ruled that a jury could find him, at the least, reckless, for not reviewing the entire tape and for putting in his report that he, and the witnesses, saw something on the video that wasn't actually there. Dalton appealed.

ISSUE: Does a mistaken arrest automatically support a lawsuit?

HOLDING: No

DISCUSSION: The Court noted that Sussman was arrested pursuant to a warrant and could make a claim only if she showed that Dalton "stated a deliberate falsehood or showed reckless disregard for the truth" and that was material to the finding of probable cause. The Court noted that Dalton simply reported what the witnesses told him and "had no reason to suspect that the witnesses were lying." The Court noted there was "no confusion in Dalton's report about which facts from the video he corroborated and which facts he established by hearsay." All that mattered is what he "actually knew at the time he wrote the police report" and he had no knowledge of what was on the rest of the tape. (He reported she picked up the wallet, not realizing that he was viewing a lawful act of her handling her own wallet, and noted that even if "fiddling with a wallet is common in a Laundromat," that did not defeat probable cause.)

The court concluded that "it is unfortunate that the innocent Sussman was arrested, but it appears from the record that her arrest was the result of bad luck rather than Dalton's deliberate overreaching." Further, it agreed, "it is remarkable how these minor circumstances arranged themselves in such a way that Sussman appeared guilty of the theft."

The Court reversed the denial of qualified immunity and remanded the case.

Shreve v. Reed, 743 F.3d 126 (6th Cir. 2014)

FACTS: In August, 2008, Reed suffered a seizure while walking down the street in Columbus. He "violently resisted" emergency personnel trying to transport him, so he was charged with assaulting a peace officer. In December, he was found not guilty by reason of insanity and ordered committed to a local facility. However, since there was no space at the facility, he was still in jail on January 29, 2009.

On that day, he suffered another seizure. Sheriff's deputies entered and tried to handcuff him, in order to transport him for treatment. During the struggle, and when they had been able to secure only one cuff on his wrist, deputies Tased him twice. The entire incident was captured on video and neither side contests the admissibility or completeness of the video. At the hospital, Reed's handcuffs were removed and his leg irons secured to the bed rail. While one of the deputies was outside the room, leaving only one, Reed got off the bed. He was ordered to lie back down and refused, and ultimately, he lunged toward the deputy with his hands up. He was again tased.

Reed filed suit under 42 U.S.C. §1983, claiming violations of the Eighth and/or Fourteenth Amendments, arguing that he was subjected to excessive force. The trial court gave the deputies qualified immunity and Reed appealed.

ISSUE: May a video support that more credence be given to the facts as provided by officer-defendants?

HOLDING: Yes

DISCUSSION: Reed argued that the decision was incorrect because it relied on the narration of the facts given by the deputies (primarily through the use of the video). The Court looked to Scott v. Harris,[108] and agreed that it "stands for the proposition that witness accounts seeking to contradict an unambiguous video recording do not create a triable issue."

The Court noted that Reed, as a person in custody awaiting transfer to a mental health facility, did not fit squarely into the Fourteenth Amendment's protection of pretrial detainees and the Eighth Amendment's protections for convicted prisoners. The trial court had elected to consider him to be protected by the Fourteenth Amendment.[109] The standard for excessive force claims under the Fourteenth Amendment is that of the "shock the conscience." However, when officials are responding to a "rapidly evolving, fluid, and dangerous predicament," the standard is the same between the two, the difference between a good faith effort to maintain discipline versus a malicious and sadistic attempt to cause harm. [110]

Looking at each incident, in turn, the Court looked first to the cell incident. The Court noted that although the deputies appeared to be taking their time and showed some indication of deliberation, the video also compel the Court to note that they were not showing deliberate indifference to Reed's rights. The tried to handcuff him without deploying the Taser, and warned of the use of the Taser each time. They knew that a loose handcuff was a serious danger, and even if Reed was unable to comprehend or comply with their orders, it was proper to use a Taser to subdue and secure him. Nothing suggested that they were acting for any other reason but to secure him for medical

[108] 550 U.S. 372 (2007).
[109] See Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008).
[110] Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).

treatment, which they were likewise required to provide. Although Reed may not have been acting intentionally, the "constitutional inquiry centers on the deputies' intent, not Reed's."[111]

The Court continued:

> All of this leaves Reed with nothing more than the argument that we should infer deliberate indifference from the video recording. But we have seen the recording. It shows that three deputies tried three times to handcuff Reed before the first use of a Taser, and they were again unsuccessful before deploying the Taser a second time; it shows that they instructed him at least a dozen times to put his hands behind his back so that they could put handcuffs on him; it shows Reed flailing around with a loose handcuff; and finally, it shows that they warned him four times that the Taser would hurt. The deputies' use of the Taser in this context may have been a miscalculation, but it does not "shock the conscience."

The Court noted that the deputies were "in an impossible Catch-22 situation: wait too long and risk being accused" of being deliberately indifferent to his medical needs" or act too soon and risk the allegations made in this case. Their use of a Taser was not unconstitutional.

With respect to the hospital incident, the Court noted that the deputy had no opportunity to deliberate given the "cramped quarters" and "Reed's position over him while standing on the bed." Although he may have violated agency policy (using the Taser on a subject secured in leg irons), that did not make it a constitutional violation.

The Court ruled that summary judgment in favor of the deputies (and the county) was appropriate on all claims.

1983 – MEDICAL NEED

Kollin v. City of Cleveland, 2014 WL 406749 (6th Circ. 2014)

FACTS: In October, 2009, while driving in Cleveland, Kollin suffered a stroke. Officer Carney responded and within minutes, had arrested Kollin for DUI, stating that he "smelled of alcohol and failed three field sobriety tests" supposedly witnessed by another officer. (That officer later disputed both.) Officers Thompson and Small took Kollin from Officer Carney and transported him to the jail. Later paperwork indicated that he was able to walk into the station, but within minutes, was showing indications of paralysis. At booking, he was placed in a wheelchair and one of the officers stated he never said a word. A photo taken "shows Kollin sitting, gazing to the right with half-shut eyes and his left arm dropped to his side." Officers agreed he looked the same at the accident scene. They tried to give him a breath test but he could not blow into the instrument.

Finally, an ambulance was called, with the chief complaint being that he was unresponsive and incoherent. They observed a "fixed gaze," a "facial droop," and a completely paralyzed left arm. Although the EMS report had some patient history, it was undetermined who provided it.

[111] See Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)

Blood tests confirmed he had no alcohol or illicit drugs in his system and he died some weeks later from complications due to the stroke. His estate filed suit and most parties were dismissed, with only Carney and the City of Cleveland remaining. Carney appealed the denial of summary judgment.

ISSUE: Does a dispute about material facts in a lawsuit require that the case be allowed to go forward?

HOLDING: Yes

DISCUSSION: The Court noted that there were many facts in dispute regarding the point at which Officer Carney realized that Kollin needed medical attention. The inconsistencies in the evidence (forms that were completed) and the testimony left open many "genuine issues of material fact" as to when he came to that realization and acted.

The Court dismissed the appeal.

Smith v. McBurney, 2014 WL 1193354 (6th Cir. 2014)

FACTS: On April 2, 2010, Officer Baker (Corbin PD) responded to a call of a "car swerving all over the road." He stopped it and found Smith driving – "eyes bloodshot, speech slurred." Baker arrested Smith and told Smith he "needed to walk to the back of the police car." Smith alleged that before he could do so, Baker pepper-sprayed him, and that he was then forced into the car head first, and the car door slammed on his leg repeatedly. Baker stated that "Smith pretended to faint and fell near the road – where he lay uncooperative." They struggled to get him to move (he was obese) and "tased him to get him to move." They finally got him away from the road.

Believing that the jail would refuse him, Baker called an ambulance. (Smith believed he went to the jail first, however.) His blood-alcohol at the hospital was in excess of 5 times the legal limit. He was diagnosed with the alcohol intoxication and other medical issues, including "chronic leg pain." He was cleared and released, but "Smith told Baker he could not walk and needed a wheelchair."

Baker took Smith to the Whitley County Detention Center. The jail refused him because his blood pressure was too high. He was taken back to the jail to be cleared, again, and at the same time, Baker's supervisor tried to talk the jail into accepting him. A little after midnight, Baker returned with Smith. The jail admitted him this time, noting the medical issues but also indicating no signs of trauma or injury. Nurse Halcomb saw him that afternoon and noted that both his ankles were very large and swollen. She thought he might have a fractured ankle and he was released to a friend. He chose not to go to the hospital, however, for eight days, claiming he did not want to be detoxed there. His ankle was, indeed, "badly broken" and ultimately, he underwent surgery. Within the year, the leg was amputated.

Smith filed suit under 42 U.S.C. §1983 against Corbin and Whitley County. The District Court granted summary judgment for all of the defendants except for the claims against the police for assault, battery and excessive force. Those were settled. Smith appealed the dismissal.

ISSUE: Is a jail required to give adequate medical care?

HOLDING: Yes

DISCUSSION: Smith argued that Whitley County was "deliberately indifferent to his medical needs and that the jail did not adequately train its employees to provide adequate medical care. The Court noted that there was no history of issues with the jail regarding training or medical care, nor any issues of which the jail supervisor (sued in his individual capacity) would have been aware. As such, the Court found that summary judgment was appropriate.

TRIAL PROCEDURE / EVIDENCE – EXCITED UTTERANCE

U.S. v. Overton, 2014 WL 1465492 (6th Cir. 2014)

FACTS: On April 29, 2012, sometime after 2 a.m., Gore was waiting on a friend, Paschal, to pick him up. He was sitting in his own car, with the door open, at the time. Overton approached and asked Gore for a cigarette lighter. Gore told he didn't have one and Overton became aggressive, eventually pulling "what appeared to be a firearm from his jacket." He ordered Gore to move to the passenger side of the car and Overton got behind the steering wheel, still holding the firearm "touching Gore's side." He demanded Gore's keys and phone, Gore tried to stall. Eventually, he surrendered both, but remembering that the passenger side was unlocked, he also jumped out and fled. Overton drove away in Gore's car. Paschal arrived. Gore, terrified, told Paschal that he'd been robbed and to take him to the police department. He also said "man, he put a gun to my head man." A report was made of the robbery.

Five days later, EMS responded to a man unconscious in his vehicle at a gas station. Upon arrival, they found Overton, unresponsive, in what was later learned to be Gore's vehicle. He did not respond to the fire truck's air horn or an ammonia inhalant, but did respond to a "sternum rub." He was "confused and disoriented" and grabbed the firefighter's shirt who did the sternum rub. While talking to him, he moved in such a way that the EMS crew spotted the pistol. They removed him from the car and secured the weapon.

Overton was ultimately charged with carjacking, using the firearm in commission of a crime, and being a felon in possession. He moved for suppression and was denied. He pled guilty to the felon in possession and was ultimately convicted of the other two charges. He appealed.

ISSUE: Is an excited utterance admissible?

HOLDING: Yes

DISCUSSON: Overton argued that it was improper to introduce into evidence Gore's statement about the weapon, which was repeated by Paschal. The Court agreed that the statement was admissible under FRE 803(2) as an "excited utterance" – with permits the admission of a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."

To qualify as an excited utterance, a statement must meet three requirements:

> "First, there must be an event startling enough to cause nervous excitement. Second, the statement must be made before there is time to contrive or misrepresent. And, third, the

statement must be made while the person is under the stress of the excitement caused by the event."[112] Clearly, the statement met the first and the third requirement, Overton challenged only the second. The Court noted that precedent did not require that the statement be made "*during* the course of a startling event" – only that the individual be still emotionally upset by it. As such, it was reasonably to admit it.

Overton also challenges the admission of the weapon found on his person during the EMS call. The Court agreed that the pistol, although it could not be specifically linked to the carjacking, certainly "made it more probable that Overton took Gore's car with the conditional intent to kill or cause serious bodily harm" – when coupled with the victim's statement that a gun had been used in the carjacking. As such, its probative value was high. Although "propensity evidence" is not admissible to "show that a defendant acted in conformity with any particular character trait on a specific occasion," the weapon was properly admitted to establish an element of the carjacking.

The Court also quickly concluded that Overton lacked standing to assert a right to privacy in Gore's vehicle, which he'd stolen.[113] The Court affirmed the trial court's decisions.

TRIAL PROCEDURE / EVIDENCE - BRADY

U.S. v. Young, 2014 WL 350074 (6th Cir. 2014)

FACTS: On June 20, 2011, during a controlled purchase, Young sold a firearm to two informants, Stanley and Dean. Akron PD monitored the buy using an audio device, but much of the subsequent recording was inaudible. It was agreed that the recording would not be used at trial, whereupon the government indicated that Det. Brown would testify as to what he heard and have him identify Young's voice, with which he was familiar. Young further moved to limit that information. In a pre-trial hearing, the detective said he recognized it from having heard Young's voice on another recording, but that recording was never provided. The Court agreed that although close, it was sufficiently proven that the detective could recognize Young's voice.

Young was convicted of unlawful possession of the firearm and appealed.

ISSUE: Is it is a violation to fail to turn over information that isn't clearly material?

HOLDING: No

DISCUSSION: Young contended that the failure to turn over the earlier recording was a violation of Federal RCr 16. He argued that the recording was material to his defense. It was not obvious until it became the reference for Det. Brown, at which point its existence was revealed. Young's attorney never actually asked to review the recording, but the Court agreed that it is not exculpatory material.

In addition, it was proper for the jury to be allowed to weigh the credibility of the two informants, both of whom are drug addicts.

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[112] U.S. v. Davis, 577 F.3d 660 (6th Cir. 2009) (quoting Haggins v. Warden, Fort Pillow State Farm, 715 F.2d 1050 (6th Cir. 1983))

[113] U.S. v. Hensel, 672 F.2d 578 (6th Cir. 1992),

The Court upheld Young's conviction.

EMPLOYMENT – ADA

Rorrer v City of Stow, 743 F.3d 1025 (6th Cir. 2014)

FACTS: `In July, 2008, Rorrer lost the vision in his right eye in a non-work related accident. In September, 2008, his surgeon cleared him to work without restriction. The City sent him for a return-to-work exam, and he was examined by Dr. Henderson because Dr. Moten, who usually did such exams, was unavailable. He was cautioned about his vision limitations, however. Rorrer called Chief Kalbaugh, who was surprised by the release. He contacted Dr. Moten, who confirmed there's been a mistake and that Rorrer was unfit for duty as a firefighter, as his vision impairment could not be reconciled with the Bona Fide Occupational Qualifications (BFOQ) of his position. He was fired for his disability (monocular vision), and further, was denied two requested accommodations, to be taken off driving status or to be assigned to the Fire Prevention Bureau as a fire inspector.

Rorrer filed suit under the Americans with Disabilities Act (ADA) and retaliation. The trial court found in the City's favor and Rorrer appealed.

ISSUE: Is a BFOQ necessarily dispositive in an ADA determination?

HOLDING: No

DISCUSSION: Chief Kalbaugh testified that he terminated Rorrer "because his monocular vision prevented him from performing an essential function of the firefighter positions" as defined by the National Fire Protection Administration (NFPA) guidelines. However, the city had never formally adopted the NFPA standards, and testimony indicated that the city did not follow the NFPA in all ways. Dr. Moten had quoted "fire regs" in his report but could not describe the regulations that covered the issue. During discovery, there was discussion as to the listed requirements of the position, all of which included a mandatory verb with the exception of the section involving the operation of emergency vehicles, which used a qualified "may." There was argument on the part of the fire union (representing Rorrer) that his inability to operate an emergency vehicle could easily be accommodated, as the decision as to who would drive fire apparatus was left up to each station.

The court noted that, under the ADA:

> To provide a reasonable accommodation, an employer may be required to modify the responsibilities of a disabled employee's existing job or transfer the employee to a vacant position with different responsibilities.[114]
> If an employee seeks to stay in his or her current job, the term reasonable accommodation means:
> "Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position [to stay

[114] *See* 29 C.F.R. § 1630.2(o); Kleiber v. Honda of Am. Mfg., Inc , 485 F.3d 862 (6th Cir. 2007).

in the position]."[115] A suggested accommodation is not reasonable if it requires eliminating an "essential" function of the job.[116] To termination if a job function is essential, it must be found that "(1) the position exists to perform the function, (2) a limited number of employees are available that can perform it, or (3) it is highly specialized." Two factors are "the employer's judgment as to what functions of a job are essential" and an employer's "written description" of the job.[117] The regulations accompanying the ADA also direct a court to consider five additional factors:

(iii) The amount of time spent on the job performing the function;
(iv) The consequences of not requiring the incumbent to perform the function;
(v) The terms of a collective bargaining agreement;
(vi) The work experience of past incumbents in the job; and/or
(vii) The current work experience of incumbents in similar jobs.[118]

The employer's judgment as to a BFOQ is not dispositive, as it might mean that an employer may simply not wish to be inconvenienced, nor are "written job descriptions." An "individualized inquiry" is critical which requires both parties to participate in good faith. The ADA does require that the court "give consideration to the employer's determination of a BFOQ, but not necessarily deference. The court agreed that driving an apparatus was, at least, disputed with request to it being an essential function of the job.

With respect to the city's argument that there was no vacant position in the FPB that Rorrer could fill, the Court noted that the evidence at least suggested that there was. Further, the City's argument that to be an inspector, one must also be a firefighter, showed an unwillingness to provide a reasonable accommodation. (The evidence suggested that one firefighter worked in that position for two years while unable to perform firefighting duties.) The City's refusal to even discuss options showed its unwillingness to work with Rorrer in good faith.

The court reversed the summary judgment in favor of the city with respect to Rorrer's ADA claims and remanded the case for further proceedings.

MISCELLANEOUS - WRIT EXECUTION

Bray v. Planned Parenthood Columbia / Riley / Kimmet, 746 F.3d 229 (6th Cir. 2014)

FACTS: The Brays were the subject of a lawsuit, in which Planned Parenthood won a judgment in the amount of $850,000. The Brays are antiabortion activists that advocated the use of violence against facilities performing abortions, and in fact, he spent several years in prison for carrying out attacks that resulted in physical damage to such locations. Planned Parenthood had successfully sued the Brays under the Freedom of Access to Clinic Entrances Act.[119]

In 2005, PPCW sought to collect on the judgment, by filing an action in Ohio. A writ of execution was issued authorizing the U.S. Marshals to "seize specified property." Bray's wife intervened, filing

[115] 29 C.F.R. § 1630.2(o).
[116] *Id.*; *see also* 42 U.S.C. § 12111(8).
[117] 42 U.S.C. § 12111(8).
[118] 29 C. 29 C.F.R. § 1630.2(n)(3)(iii)-(vii)
[119] 18 U.S.C. 248.

an action to protect her interest in the property. The Court upheld the write, which specifically listed a vast number of items, including books and computer equipment, with exceptions only for Bibles and children's books. The Court separately authorized someone from PPCW to accompany the marshals. Knowing that the seizure was imminent, the Brays sought to work with the Marshal's Service to avoid traumatizing their children.

During the raid, allegedly, Bray was ordered to remain sitting on the sofa in the house and he was denied the right to walk around or communicate with his attorney. The marshals refused to identify the "numerous strangers" that were present, including, apparently, multiple individuals connected with PPCW. The raid was documented by at least one person recording. Bray was not permitted to verify what was removed from the home.

At a later hearing, the Brays asserted that many of the items were exempt from seizure, and over a year and a half later, items were returned to the Brays pursuant to a court order. The Brays filed suit against the deputy marshals and PPCW. The Marshals sought immunity under several theories, which the District Court granted. The Court also approved of the other actions taken at the scene, including the recording, as it captured the appearance of the property at the time.

The Brays ultimately settled with PPCW, but appealed the decision in favor of Deputy Marshal Kimmet and Riley.

ISSUE: Does the analysis of items seized during an execution for the purposes of satisfying a money judgment have to be exacting when it involves media and communications property?

HOLDING: Yes

DISCUSSION: The Court noted that because "the overwhelming focus of the writ was media and communications property," its analysis had to be "particularly exacting." [120]

The Court looked first to the four-hour detention of Bray during the execution of the writ. The Court noted that "the raid presented none of the operational and safety concerns that may justify seizing the occupants of a home during the execution of a criminal warrant." Further, allowing him to leave, or move unrestrained in the house, "would not have threatened the completion of the search." The Court noted that inviting civilians (connected to PPCW) indicated that the marshals did not feel threatened by Bray, and further, that they allowed numerous persons, rather than the clear instruction of one, only exacerbated the issue. The court noted that the conduct of an officer at such scenes, must "relate to the lawful objectives of the order."[121] PPCW had no "articulated expertise in satisfying the ostensible purpose of the writ, identifying valuable goods to satisfy a monetary judgment." Further, the writ did not authorize a camera, either, and filming under such circumstances, in a private home, "posed the heightened risk of intimidating the family and capturing its intimate, unguarded moments. "

[120] Stanford v. Texas, 379 U.S. 476 (1965),Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (internal quotations and citations removed); *see also* Walter v. U.S. 447 U.S. 649 (1980); A Quantity of Books v. Kansas, 378 U.S. 205(1964); Marcus v. Search Warrant, 367 U.S. 717 (1961).
[121] Wilson v. Layne, 526 U.S. 603 (1999).

The Court continued:

> … the marshals' asserted actions add support to the argument that the ostensible goal of the raid (identifying valuable goods to satisfy a monetary judgment) served as a pretext for intimidating the Brays and identifying disfavored books and papers for confiscation. This inference is particularly strong in light of the writ's focus on expressive materials of negligible market value.

Of particular concern, the order authorized the seizure of even unpublished materials (expressive content) written by Bray, As such, the Court agreed the actions of the marshals was unreasonable. However, because these rights were not clearly established at the time, the Court agreed that qualified immunity was appropriate for the marshals. As the Court had not yet addressed "the Fourth Amendment implications of a search or a seizure under the civil writ of execution. " There was, however precedent for immunity when a detention is specifically authorized. Further, because having third parties present was permitted in some circumstances, and because filming was authorized in the context of valid search warrants, a reasonable officer could have believed those actions were permitted.

The Court affirmed the qualified immunity for the two marshals.

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docjt.legal@ky.gov

Please remember to include your name, rank, agency and a contact number should we need further information regarding your inquiry.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Please allow two to three business days for us to review and respond to your inquiry.

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